TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 597.

R. J. HOUSE, PLAINTIFF IN ERROR,

vs.

JOEL B. MAYES, MARSHAL OF JACKSON COUNTY, MISSOURI, AND ELLIOTT W. MAJOR, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED JUNE 8, 1910.

(22,218.)

(22,218.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 597.

R. J. HOUSE, PLAINTIFF IN ERROR,

vs.

JOEL B. MAYES, MARSHAL OF JACKSON COUNTY, MISSOURI, AND ELLIOTT W. MAJOR, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

	Original.	Print
Writ of error and return	1	1
Caption	1*b*	2
Petition for writ of *habeas corpus*	2	2
Exhibit A—Capias	3	3
Order that writ of *habeas corpus* issue	4	4
Order filing return	4	4
Writ of *habeas corpus*	5	4
Marshal's return	6	5
Exhibit A—Information	7	5
Exhibit B—Capias	8	6
Abstract and brief for petitioner, filed October 18, 1909	9	7
Statement and brief for respondent	25	15
Entry of argument and submission	52*a*	31
Abstract and brief for petitioner, filed November 20, 1909	53	32
Judgment	79	45

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 27, 1910.

	Original.	Print
Opinion of the court	80	46
Concurring opinion by Woodson, J.	95	55
Dissenting opinion by Graves, J	98	56
Dissenting opinion by Fox, J.	119	67
Order filing motion for rehearing	124	69
Motion and suggestions for rehearing	124	70
Order overruling motion for rehearing	128	72
Order allowing writ of error, &c	128	72
Petition for writ of error	129	72
Assignment of errors	130	73
Citation and service	132	73
Bond on writ of error	133	74
Clerk's certificate	135	74

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of Missouri, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Missouri before you, or some of you, being the highest Court of Law or Equity of the said State in which a decision could be had in the said suit, wherein R. J. House was petitioner in habeas corpus, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said R. J. House, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then under your seal,
distinctly and openly, you send the record and proceedings
1*a* aforesaid, with all things concerning the same, to the Su-
preme Court of the United States, together with this writ, so that you have the same at Washington, on the 30th day of May next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30 day of April, in the year of our Lord, nineteen hundred and ten.

Issued at office in Jefferson City, Missouri, with the seal of the Circuit Court of the United States for the Western District of Missouri, Central Division dated as aforesaid.

[SEAL.]

H. C. GEISBERG,
Clerk of said Circuit Court.

Allowed by—

LEROY B. VALLIANT,
Chief Justice of the Supreme Court of Missouri.

Return to Writ.

UNITED STATES OF AMERICA,
State of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled cause together with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said Court at the City of Jefferson, this 25th day of May A. D. 1910.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN, *Clerk,*
By F. M. LUDWICK, *D. C.*

1*b* In the Supreme Court of Missouri, April Term, 1910.
Court in Banc.

STATE OF MISSOURI, *sct:*

Be it remembered that heretofore, to-wit, on the 23rd day of September, 1909, there was filed in the office of the Clerk of the Supreme Court of the State of Missouri, a petition for a writ of Habeas Corpus in a certain cause wherein Exparte R. J. House is Petitioner and Joel B. Mayes, Marshal of Jackson County, Missouri, is Respondent, which said petition for a writ of Habeas Corpus is in words and figures as follows, to-wit:

2 In the Supreme Court of the State of Missouri, — Term, 1909.

Ex Parte R. J. HOUSE.

Petition for Writ of Habeas Corpus.

To the Honorable Judges of the Supreme Court:

Your petitioner, R. J. House, respectfully represents that he is unlawfully deprived of his liberty by Joel Mayes, in the County of Jackson in this State, by virtue of an alleged warrant, a copy of which is hereto attached as Exhibit "A"; that your petitioner has not applied for a writ of habeas corpus in any court of superior jurisdiction but has made application to the circuit court of said county which writ was denied.

Your petitioner says that said imprisonment is illegal in this, to-wit, that said arrest was made and your petitioner is confined solely because of an alleged violation of an act of the Legislature approved June 8th, 1909, entitled, "An Act to prevent fraud in the purchase and sale of grain and other commodities" (Laws of Missouri 1909, page 519). It being alleged that your petitioner under claim of right to do so by reason of a rule of the Board of Trade of Kansas City, Missouri, did deduct one hundred (100) pounds from the returned weight of a car load of grain purchased by him upon the trading floor of said Board of Trade. That your petitioner respectfully says that said law is invalid and of no force and constitutes no justification or basis for his arrest and confinement, being in violation of Sections 4 and 30, Article II, in that it interferes with his liberty and right of contract and his right to enjoy the gains of his own industry, and Section 53, Article IV, (prohibiting special laws regulating trade) of the Constitution of the State and of the Fourteenth Amendment to the Constitution of the United States, in that it deprives him of liberty and property without due process of law and interferes with his right of contract.

Wherefore, your petitioner prays that a Writ of Habeas Corpus issue that he may be discharged from such unlawful imprisonment.

R. J. HOUSE.

3 STATE OF MISSOURI,
County of Jackson, ss:

Affiant being sworn, says that the facts in the above petition are true to the best of his knowledge and belief.

R. J. HOUSE.

Subscribed and sworn to before me, Nellie Benjamin, a Notary Public in and for Jackson County, Missouri, this 22nd day of September, 1909. My commission will expire April 29, 1913.

[SEAL.] NELLIE BENJAMIN,
Notary Public.

Capias.

STATE OF MISSOURI,
County of Jackson, ss:

EXHIBIT "A."

The State of Missouri to the Marshal of Jackson County and State aforesaid, Greeting:

We command you that you take R. J. House and him safely keep, that you have his body before the Judge of the Criminal Court of Jackson County, at the Court House in Kansas City forthwith *190-* then and there to answer unto the State of Missouri an information against him, preferred by the Prosecuting Attorney of the County of Jackson for fraud in grain weights contrary to the statutes made and provided.

Hereof fail not at your peril, and have you then and there this writ.

Witness: Andy E. Thomas, Clerk of the Criminal Court of Jackson County, with the seal thereof hereto affixed at office in Kansas City, Mo., this 21st day of September A. D. 1909.

[SEAL.] ANLY E. THOMAS, *Clerk*,
By T. V. DOWNING, *D. C.*

4 And thereafter, to-wit, on the 23rd day of September, 1909, the Court made and entered of record the following:

Ex Parte R. J. House, Pet.,
v.
Joel Mayes, &c., Resp.

Now at this day, there is presented to the Hon. Leroy B. Valliant, Chief Justice of this Court, in chambers, a petition for a writ of habeas corpus herein. And having considered and fully understood the said petition, it is ordered that the said writ issue, as prayed, directed to said respondent, said writ to be made returnable October 12, 1909.

And thereafter, to-wit, on the 12th day of October, 1909, the Court made and entered of record, the following:

Ex Parte R. J. House, Pet.,
v.
Joel B. Mayes, Resp.

Come now the said respondents, by attorneys, and file their returns herein.

Which said return of said respondent is in words and figures as follows:

5 In the Supreme Court of Missouri.. In Vacation.

State of Missouri,
County of Cole, ss:

Ex Parte R. J. House.

"By the Habeas Corpus Act."

The State of Missouri to Joel Mayes, Greeting:

You are hereby commanded that the body of R. J. House, under your custody detained, as it is said, under safe and secure conduct, together with the day and cause of his being imprisoned and detained, by whatsoever name the said R. J. House, may be known, you have before the Supreme Court of the State of Missouri, en banc, on the 12th day of October, 1909, to do and receive what shall then and there *being* considered concerning the said R. J. House, so imprisoned as aforesaid, and hereof fail not at your peril.

In Testimony Whereof, I have hereunto set my hand and the seal of said court hereto affixed. Done at office in the City of Jefferson, this 24th day of September, 1909.

[SEAL.] JNO. R. GREEN, *Clerk*,
By O. T. JOHNSON, *D. C.*

6 In the Supreme Court of Missouri.

In re Application of R. J. House for Writ of Habeas Corpus.

Marshal's Return.

Now comes Joel B. Mayes and for return to the writ of habeas corpus heretofore issued herein, says he is the duly elected, qualified and acting Marshal of Jackson County, Missouri; that as such Marshal, he has in his custody and charge one called R. J. House;

Respondent shows to the court that on September 21st, 1909, there was filed in the office of the clerk of the criminal court of Jackson County, Missouri by the prosecuting attorney of said county, an information charging the said R. J. House with an unlawful purchase of grain. A true copy of said information is hereto attached, marked Exhibit "A" and made a part of this return. Respondent further shows to the court that upon the filing of the said information, the clerk of the criminal court issued a capias and delivered the same to respondent, and that by virtue of said capias, respondent arrested and now holds and detains the said R. J. House. A true copy of said capias is hereto attached, marked Exhibit "B" and made a part of this return.

Respondent herewith produces the body of the said R. J. House and awaits the further direction of the court.

JOEL B. MAYES,
Marshal of Jackson County, Mo.

7 EXHIBIT A.

(Copy.)

Information.

STATE OF MISSOURI,
County of Jackson, ss:

In the Criminal Court of Jackson County, Missouri, at Kansas City, Missouri, September Term, A. D. 1909.

Now comes Virgil Conkling, Prosecuting Attorney for the State of Missouri, in and for the body of the County of Jackson, and upon his oath informs the Court, that R. J. House whose Christian name in full is unknown to said Prosecuting Attorney, late of the county aforesaid, on the first day of September 1909, at the County of Jackson, State of Missouri, did purchase, from one James Anderson, one car load of wheat, by weight, and did then and there willfully and unlawfully from the actual weight of the said wheat, so by him purchased, take and deduct one hundred pounds; he the said R. J. House pretending and claiming to have the right to make such deduction, and to have and keep the said one hundred pounds of wheat so deducted free of charge and cost to him, under and by virtue of a rule and custom of the Board of Trade of Kansas City, Missouri, contrary to the form of the statute in such cases made and provided; and against the peace and dignity of the State.

VIRGIL CONKLING,
Prosecuting Attorney.

STATE OF MISSOURI,
County of Jackson, ss:

Virgil Conkling, Prosecuting Attorney in and for Jackson County, Missouri, makes oath and says that the facts set forth in the foregoing information are true, according to his best information and belief.

VIRGIL CONKLING.

Subscribed and sworn to before me this 21st day of September 1909.

[SEAL.] ANDY E. THOMAS,
Clerk of the Criminal Court of Jackson County, Missouri,
By L. V. DOWNING, *D. C.*

8 *Capias.*

STATE OF MISSOURI,
County of Jackson, ss:

The State of Missouri to the Marshal of Jackson County and State Aforesaid, Greeting:

We command you that you take R. J. House and him safely keep, that you have his body before the Judge of the Criminal Court of Jackson County, at the Court House in Kansas City, Forthwith *1909* then and there to answer unto the State of Missouri an information against him, preferred by the Prosecuting Attorney of the County of Jackson for Fraud in Grain Weights contrary to the statutes made and provided.

Hereof fail not at your peril, and have you then and there this writ.

Witness: Andy E. Thomas, Clerk of the Criminal Court of Jackson County, with the seal thereof hereto affixed at office in Kansas City, Mo., this 21st day of Sept. A. D. 1909.

[SEAL.] ANDY E. THOMAS, *Clerk,*
By L. V. DOWNING, *D. C.*

Executed this writ in the County of Jackson, and the State of Missouri, on this 22nd day of September 1909.

By arresting and taking the said R. J. House into my custody.

JOEL B. MAYES,
County Marshal.

Fee $—.

And thereafter, to-wit, on October 18, 1909, the petitioner filed his printed abstract, brief and argument in words and figures, as follows, to-wit:

9 In the Supreme Court of Missouri.

No. —.

In the Matter of the Application of R. J. House for Writ of Habeas Corpus.

Original Proceedings.

Abstract and Brief and Argument for Petitioner.

Statement.

On September 22, 1909, your petitioner was arrested in Jackson County, Missouri, by Joel B. Mayes, county marshal, under a citation issued from the Criminal Court of Jackson County, on an information filed the day previous. This information was in due form and alleged that upon September 1, 1909, your petitioner had 10 bought a carload of wheat in Kansas City, Missouri, and from the weight thereof had deducted one hundred pounds under claim of right so to do, because of a custom or rule of the Board of Trade of Kansas City, Missouri, which deduction was alleged to be in violation of an act entitled: "An Act to Prevent Fraud in the Purchase and Sale of Grain and Other Commodities" (Laws of 1909, p. 519).

An application for a writ of *habeas corpus* was that day presented to the Circuit Court of Jackson County and denied, whereupon application was made to the Honorable Chief Justice in Chambers for such a writ, which was granted September 23, 1909.

Respondent Mayes has made return to the writ, setting forth the arrest under the authority above set forth.

11 *Agreed Statement of Facts.*

"Without admission of either party as to the relevancy of any particular fact herein set forth, the following facts are agreed between the parties:

There are competitive grain markets at Galveston, Texas; Chicago, Illinois; Omaha, Nebraska; Atchison and Wichita, Kansas; and St. Louis, St. Joseph and Kansas City, Missouri. That Kansas City is a primary grain market. That a very slight difference in price or condition will influence the market course of grain.

That the Board of Trade of Kansas City, Missouri, is a voluntary organization of buyers and sellers of grain and provisions, supported by dues and assessments and maintained for the purpose of furnishing a marketing place where such persons can meet and, under rules of safety and convenience, transact such business. Its objects are:

" 'To maintain a Board of Trade to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in business; to facilitate the speedy adjustment of business disputes; to inspire confidence in the business methods and integrity of the parties hereto; to collect and disseminate valuable commercial and economic information, and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits, and to promote the general welfare of Kansas City.'

Its members are governed by rules and regulations, enacted by the members, and which form part of the written contract of association between them.

12 This organization provides for the exclusive use of its members a trading floor where grain is bought and sold only under and according to said rules. Three of said rules are:

" 'SEC. 16. The weight Supervising Committee shall have supervision, through the Weight Department, of the unloading of all cars unloaded at all elevators, mills, warehouses, transfer and team tracks, within the jurisdiction of this Board and shall cause the same to be thoroughly swept and cleaned when unloaded. Sweeping or cleaning of cars subsequently by any operator or employé of any elevator, mill, warehouse, transfer or team tracks, or by any person or persons under agreement with the same; or the buying or receiving of any such sweepings or cleanings by any member of this Association is prohibited.

'SEC. 17. Violations of any of the provisions of Section 16 of this article shall subject the member so violating to a fine of $50.00 for the first offense, to a fine of $100.00 for the second offense, to expulsion and forfeiture of membership for the third offense.

'SEC. 18. On all grain bought by members of the Kansas City Board of Trade, and on which Kansas City unloading weights are given, an allowance of one hundred pounds per car shall be made to the buyer, to cover loss on account of dirt and other foreign matter.'

That said board of trade maintains a bureau of weights, which strictly enforces rule 16.

That rules 16 and 17 were enacted to secure to the seller the full weight of the entire contents of the car and rule 18 to secure the buyer from loss through dirt and foreign matter in or swept out with the grain, which was unloaded at Kansas City. Before grain is sold it is graded. One of the considerations in grading is the dirt and foreign matter in the grain. Experience had shown that there is a loss from dirt and foreign matter, varying with different cars, which is not fully taken care of in the grade. That there is no method in use of accurately determining the percentage of such foreign matter and dirt and the one hundred pound quantity was taken as a fair average.

13 The members of said Board of Trade buy and sell sometimes as commission men for outsiders and sometimes for their own account and it is impossible to tell without inquiry

whether a buyer or seller is acting for himself or for someone else. The buying and selling of grain on the floor of said Board of Trade is, as in all other markets, based upon the constantly and rapidly fluctuating market prices in that and the other principal grain markets. There is no time nor opportunity to ascertain the capacity (principal or agent) in which a member is acting when he buys or sells, and, if he be in reality acting as agent, no opportunity to investigate the financial standing of the real principal. Because of this condition and also to secure the prompt and faithful performance of all such contracts of sale, there is a rule of said Board of Trade forbidding the disclosure of outside principals and holding the member in all cases as the principal. There are also rules making a membership responsible for the faithful performance of such contracts.

That the State Railroad and Warehouse Commission has in force a rule requiring cars unloaded at Kansas City to be cleanly swept.

That the method of making the reduction is to weigh the loaded car; then after emptying and cleanly sweeping the car, to weigh the car; the difference in these two weights is entered on the account sales as the weight of the carload of grain, the deduction of one hundred pounds being also noted on that slip and settlement made for this balance. That is, the weight of the entire contents of the car is shown and also the one hundred pound deduction on the face of the account sales given the seller.

That upon the first day of September, 1909, your petitioner bought upon the trading floor of said Board of Trade and from a member thereof, a carload of wheat on Kansas City unloading weights. In accordance with the above method and under said rule 18, he deducted one hundred pounds and made settlement for the balance.

The member selling this grain did not own it, but was acting as a commission man. He, however, dealt with your petitioner as in his own right and your petitioner had no notice or knowledge that such seller was not the real owner of the grain. Nothing had been
14 said between the member selling and his principal as to the allowance of the one hundred pounds.

Both your petitioner and the seller understood at the time of sale that it was made subject to this rule.

FRANK HAGERMAN,
KIMBROUGH STONE,
Attorneys for Petitioner.
ELLIOTT W. MAJOR,
Attorney General,
JOHN M. ATKINSON,
Assistant Attorney-General,
For the State."

est or purpose has been served, that neither the safety, health, morals nor welfare of the public has been protected, but that his private business rights—his liberty to contract—have been arbitrarily interfered with in an unnecessary and unreasonable manner.

The alleged purpose of this act was to prevent fraud. Its title is:

19 "An Act to Prevent Fraud in the Purchase and Sale of Grain and Other Commodities."

The manner in which the law seeks to prevent this alleged fraud is to make it a crime for any purchaser of grain, seed, hay or coal to "deduct any amount from the actual weight or measure thereof under claim of right to do so by reason of any custom or rule of a Board of Trade or any pretense whatsoever."

Obviously the statute regards a deduction by the purchaser from the weight of grain under a custom or rule of a Board of Trade as a fraud requiring legislative prevention. Plainly if no semblance of fraud is present in such a transaction, if the deduction is based upon sound and fair business conditions, then the legislature cannot prevent such a practice merely by declaring it fraudulent. It is, therefore, of controlling importance for the court to determine whether the facts surrounding the transactions at which the law aimed are such as to justify legislative police interference on the ground of prevention of fraud.

Fraud cannot exist without deception. There can be no fraud where no one is or can be deceived. The facts of the present case, which are not only typical of but identical with all transactions within the state where a deduction is made "by reason of any custom or rule of a Board of Trade," show that every circumstance surrounding the deduction is open and a matter of record. There is no concealment and no deceit. It is authorized by a printed rule governing every transaction of a great market. "* * * the
20 weight of the entire contents of the car is shown and also the one hundred pound deduction *on the face of the account sales given the seller*" (Statement, p. 5). In short, there is no attempt at concealment and every man who deals directly or indirectly in this market has documentary evidence, freely given in the line of business, of the custom and rule. Therefore, there was no ground for attacking such a transaction because of fraud growing out of any concealment.

There is just as little reason for interference on the theory that there is fraud in the transaction because there is no real ground for making the deduction, although it may be made openly. The facts show that the rule is the result of what both buyers and sellers in a great market have determined to be a just rule to govern their sales in that market. It was enacted by them "to secure the buyer from loss through dirt and foreign matter in or swept out with the grain which was unloaded at Kansas City," and "the one hundred pound quantity was taken as a fair average" of the "loss from dirt and foreign matter, varying with different cars, which is not fully taken care of in the grade," because "there is no method in use of accurately determining the percentage of such foreign matter and dirt." (Quotations are from Statement of Fact, page 4.)

Another consideration bearing upon the non-existence of this alleged fraud is that if any grain were being fraudulently taken, this law would have been unnecessary, for whether the ground or excuse for dockage was a custom or a rule of a Board of Trade, it could
never be a defense for either a civil or a criminal action unless
21 incorporated in the contract of sale, otherwise the one mak-
ing the deduction would be guilty of larceny or embezzlement, as well as civilly liable.

There must be some "reasonable ground" for the legislative interference or it cannot be justified.

State v. Missouri T. & T. Co., 181 Mo., 536, at 559;
Wisconsin R. R. Co. v. Jacobson, 179 U. S., 287, at 301; 45 L. Ed., 194 at 201;
Lochren v. New York, 198 U. S. 45; 49 L. Ed., 937;
Adair v. United States, 208 U. S., 161, at 173; 52 L. Ed., 436, at 442;
Ritchie v. People, 155 Ill., 98.

The declared purpose of this law is to prevent fraud but absolutely no ground for supposing the presence of fraud exists, on the contrary, the entire absence of such ground is shown.

The truth is that the statute was in fact drawn and designed to benefit one class at the expense of another.

Despite its general language, this law was aimed at one thing and that alone. It was intended to abolish the hundred pound deduction in carload grain sold on the floor of the Board of Trade of Kansas City, Missouri. Certain elevator men, not members of the Board of Trade, nor grain raisers, nor producers, nor even citizens of the state, knew that they could not send their grain to that market and escape a dockage on the carload for dirt in the grain and car.
One of the Board of Trade rules permitted the hundred
22 pound dockage. They were exclusively sellers in that market.
They wished the benefit of the rule which gave them the weight of the entire carload—wheat, dirt and foreign matter—as wheat, but they wished to escape the deduction for dirt and foreign matter. They wished to avail themselves of the market afforded by the Board of Trade and to take advantage of the rules of that market which favored them and to have declared criminal those rules which were unfavorable to them.

They knew that sales upon the market floor of the Board of Trade must of necessity be upon the sole responsibility of the members who take part in the transaction. There is no time to investigate whether the member who offers to buy or sell is acting for himself or some one else, and if the latter, who the principal is, his financial responsibility and the exact extent of the agent's authority. The Board of Trade rules provide for the punishment by fine or expulsion of members who do not fulfil their contracts and obligations and the value of a membership itself is placed behind every transaction a member makes. Nor does a member who is buying or selling for outsiders care to give every other member the names of his patrons.

Thus experience has taught that for business and disciplinary reasons it is imperative that the members be in all cases regarded as the principals and held as such by other members in all market purchases or sales. It was the thorough knowledge on the part of the framers of this law of the great importance of this attitude that made them require in this law that no "rule of a Board of
23 Trade" should justify a dockage and that no agent shall be presumed to have authority to sell according to such a rule. In short, to escape fine or imprisonment the buyer must find out *before* he buys whether the other member is acting for himself or another, and if for another, the exact terms of his agency, and the financial responsibility of his principal—things which would take so much time and investigation that the entire method of dealing in great markets would have to be revolutionized. And they knew that no one market could revolutionize the method of dealing in the grain markets of the world. The authors figured that when faced with the difficulty of the situation, coupled with the risk, and when compelled to alter completely the trading machinery necessary to transact the business of a great market which must conform to the methods of the world's markets or go out of existence, the members of Boards of Trade subject to the statute would prefer to forego the dockage. If it was not for this one and single purpose that the law was passed why is the *buyer* the only one penalized? Why is not the seller penalized if he, as agent without authority, makes for his principal the contract forbidden by the statute? All because the sole object of the statute was to make it as difficult, burdensome and dangerous as possible to take the dockage.

The only possible result the law could have, if any, would be to compel the buyer of grain to accept it upon terms which are different from those which obtained when the parties were left to do their own bargaining.

It is the necessary operation—the natural and reasonable
24 effect of a statute, that determines not only the motives of the legislature but the validity of the law. Henderson v. New York City, 92 U. S., 259, 268; 23 L. Ed., 543, 547; Soon Hing v. Crowley, 113 U. S., 703, 710; 28 L. Ed., 1145, 1147; Mugler v. Kansas, 123 U. S., 623, 661; 31 L. Ed., 205, 210 and State of Minnesota v. Barber, 136 U. S., 313; 34 L. Ed., 455, 457, where Mr. Justice Harlan, delivering the opinion of the court, said:

"The presumption that this statute was enacted, in good faith, for the purpose expressed in the title namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may by its necessary operation, be destructive of rights granted or secured by the constitution. In such cases the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. This principle of constitutional interpretation has often been announced by this court."

Assuredly it is serving no public interest for the state to aid either party in an ordinary commercial sale by restricting the freedom of the other party.

There was no proper place for this statute—no proper work for it to perform. Such a law is, therefore, unnecessary and unreasonable, serving no public purpose or interest. On its face this law is intended to hamper the making of such contracts and it does of necessity do so. It thus interferes with those who desire to enter into such contracts, and being unnecessary and without public purpose, it is an unlawful interference with that liberty guaranteed by the national and state constitutions.

For the foregoing reasons, we urge that the petitioner should be discharged.

Respectfully submitted,

FRANK HAGERMAN,
KIMBROUGH STONE,
Attorneys for Petitioner.

25 And thereafter, to-wit, on October 26th, 1909, respondent filed his statement, brief and argument, in words and figures as follows:

In the Supreme Court of Missouri, October Term, 1909.

In Banc.

No. 15760.

In the Matter of the Application of R. J. House for Writ of Habeas Corpus.

Original Proceedings.

Statement, Brief, and Argument on the Part of the State.

Statement.

On September 21, 1909, Hon. Virgil Conkling, prosecuting attorney of Jackson county, filed with the clerk of the criminal court of said county an information, in due form, charging the 26 petitioner, R. J. House, with the violation of an act entitled "An act to prevent fraud in the purchase and sale of grain and other commodities" (Laws 1909, p. 519), which said information, omitting caption, venue and verification, reads as follows:

"Now comes Virgil Conkling, prosecuting attorney for the State of Missouri, in and for the body of the county of Jackson, and upon his oath informs the court that R. J. House, whose Christian name in full is unknown to said prosecuting attorney, late of the county aforesaid, on the first day of September, 1909, at the county of Jackson, State of Missouri, did purchase, from one James Anderson, one car load of wheat, by weight, and did then and there willfully and unlawfully, from the actual weight of the said wheat so by him purchased, take and deduct one hundred pounds, he, the said R. J. House, pretending and claiming to have the right to make such deduction, and to have and keep the said one hundred pounds of wheat so deducted free of charge and cost to him under and by virtue of a rule and custom of the Board of Trade of Kansas City, Missouri, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

VIRGIL CONKLING,
Prosecuting Attorney."

Thereupon the clerk of said court issued a *capias* to the marshal of said county, and said petitioner was thereafter duly arrested.

On September 23 thereafter petitioner applied to this Honorable Court for his release by writ of habeas corpus, alleging, among other things in his petition, that said act of the Legislature, under which he was being prosecuted, is "in violation of sections 4 and 30, article II, in that it interferes with his liberty and right of contract and his right to enjoy the gains of his own industry, and section 53, article
IV (prohibiting special laws regulating trade), of the Consti-
27 tution of the State and of the Fourteenth Amendment to the
Constitution of the United States, in that it deprives him of liberty and property without due process of law, and interferes with his right to contract."

Upon the filing of his petition herein the Chief Justice of this Court issued the writ, returnable October 12, and return was on said date duly made.

The case is submitted to the court upon the following agreed statement of facts:

"*Agreed Statement of Facts.*

"Without admission of either party as to the relevancy of any particular fact herein set forth, the following facts are agreed between the parties:

"There are competitive grain markets at Galveston, Texas, Chicago, Illinois, Omaha, Nebraska, Atchison and Wichita, Kansas, and St. Louis, St. Joseph and Kansas City, Missouri. That Kansas City is a primary grain market. That a very slight difference in price or condition will influence the market course of grain.

"That the Board of Trade of Kansas City, Missouri, is a voluntary organization of buyers and sellers of grain and provisions, supported by dues and assessments and maintained for the purpose of furnishing a marketing place where such persons can meet and, under rules of safety and convenience, transact such business. Its objects are 'To maintain a Board of Trade to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in business; to facilitate the speedy adjustment of business disputes; to inspire confidence in the business methods and integrity of the parties hereto; to collect and disseminate valuable commercial and economic information, and generally secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits, and to promote the general welfare of Kansas City.'

28 "Its members are governed by rules and regulations, enacted by the members, and which form part of the written contract of association between them.

"This organization provides for the exclusive use of its members a trading floor where grain is bought and sold only under and according to said rules. Three of said rules are:

"SEC. 16. The weight supervising committee shall have supervision, through the weight department, of the unloading of all cars unloaded at all elevators, mills, warehouses, transfer and team tracks, within the jurisdiction of this board, and shall cause the same to be thoroughly swept and cleaned when unloaded. Sweeping or cleaning of cars subsequently by any operator or employé of any elevator, mill, warehouse, transfer or team track, or by any person or persons under agreement with the same; or the buying or receiving of any such sweepings or cleanings by any member of this association is prohibited.

"SEC. 17. Violations of any of the provisions of section 16 of this article shall subject the member so violating to a fine of $50.00 for the first offense, to a fine of $100.00 for the second offense, to expulsion and forfeiture of membership for the third offense.

"SEC. 18. On all grain bought by members of the Kansas City Board of Trade, and on which Kansas City unloading weights are given, an allowance of one hundred pounds per car shall be made to the buyer, to cover loss on account of dirt and other foreign matter.

"That said Board of Trade maintains a bureau of weight which strictly enforces rule 16.

"That rules 16 and 17 were enacted to secure to the seller the full weight of the entire contents of the car, and rule 18 to secure
29 the buyer from loss through dirt and foreign matter in or
swept out with the grain which was unloaded at Kansas City. Before grain is sold it is graded. One of the considerations in grading is thedirt and foreign matter in the grain. Expereince has shown that there is a loss from dirt and foreign matter, varying with different cars, which is not fully taken care of in the grade. That there is no method in use of accurately determining the percentage of such foreign matter and dirt, and the one hundred pound quantity was taken as a fair average.

"The members of said Board of Trade buy and sell sometimes as commission men for outsiders, and sometimes for their own account, and it is impossible to tell without inquiry whether a buyer or seller is acting for himself or for someone else. The buying and selling of grain on the floor of said Board of Trade is, as in all other markets, based upon the constantly and rapidly fluctuating market prices in that and the other principal grain markets. There is no time nor opportunity to ascertain the capacity (principal or agent) in which a member is acting when he buys or sells, and, if he be in reality acting as agent, no opportunity to investigate the financial standing of the real principal. Because of this condition and also to secure the prompt and faithful performance of all such contracts of sale, there is a rule of said Board of Trade forbidding the disclosure of outside principals and holding the member in all cases as the principal There are also rules making a membership responsible for the faithful performance of such contracts.

"That the State Railroad and Warehouse Commission has in force a rule requiring cars unloaded at Kansas City to be cleanly swept.

"That the method of making the reduction is to weigh the loaded car; then, after emptying and cleanly sweeping the car, to weigh the car; the difference in these two weights is entered on the account
sales as the weight of the carload of grain, the deduction of
30 one hundred pounds being also noted on that slip and settlement made for this balance. That is, the weight of the entire contents of the car is shown and also the one hundred pound deduction on the face of the account sales given the seller.

"That upon the first day of September, 1909, your petitioner bought upon the trading floor of said Board of Trade and from a member thereof, a carload of wheat on Kansas City unloading weights. In accordance with the above method, and under said rule 18, he deducted one hundred pounds and made settlement for the balance.

"The member selling this grain did not own it, but was acting as a commission man. He, however, dealt with your petitioner as in his own right, and your petitioner had no notice or knowledge that such seller was not the real owner of the grain. Nothing had been said between the member selling and his principal as to the allowance of the one hundred pounds.

"Both your petitioner and the seller understood at the time of sale that it was made subject to this rule."

The act under which petitioner, House, is prosecuted, reads as follows:

"An Act to Prevent Fraud in the Purchase and Sale of Grain and Other Commodities.

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"Section 1. Every sale of grain, seed, hay or coal shall be made on the basis of the actual weight thereof, and any purchaser of grain, seed, hay or coal, who shall deduct any amount from the actual weight or measure thereof under claim of right to do so by reason of any custom or rule of a board of trade or any pretense whatsoever, shall be deemed guilty of a misdemeanor, and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each and every offense.

31 "Sec. 2. No agent or broker selling any grain, seed, hay or coal shall have authority, under claim or right to do so by reason of any custom or rule of board of trade, to sell any grain, seed, hay or coal only on the basis of the actual weight thereof, and any contract of sale of any grain, seed, hay or coal made in violation of this act shall be null and void. Approved June 8, 1909."

The petitioner at bar insists, that the act under which he is prosecuted is void (as we gather it from his brief) for the following reasons:

First. That said act is invalid as an unauthorized invasion of his liberty as a citizen under the Constitution of this State and of the Federal Constitution. (Brief, p. 7.)

Second. That said act does not serve any public interest or purpose, and that neither safety, health, morals nor the welfare of the public will be protected by its enforcement, and that the private business rights of said petitioner—his liberty to contract—has been arbitrarily interfered with in an unnecessary and unreasonable manner. (Brief, p. 10.)

Third. That there is no reasonable grounds for legislative interference as disclosed by the agreed statement of facts. (Brief, p. 13.)

To test the constitutionality of said act is the purpose of this suit. The facts admitted are to bring the case clearly within the inhibitions of said act and to secure the desired construction.

The State contends that said act is a constitutional and valid act as a police regulation, and should be so held by this Honorable Court.

32 *Points, Authorities, and Argument.*

I.

The act under which petitioner is prosecuted is a valid act as a police regulation requiring that all sales of grain, seed, hay and coal shall be made on the basis of the actual weight thereof for the purpose of preventing fraud in the sales of such commodities.

Police Power Defined.

(1) Before taking up said act for analysis, perhaps, it will not be amiss to here give a few of the definitions, or rather attempted definitions, of what is the police power of the State.

"The public regulation and domestic order of the kingdom, whereby the inhabitants of a state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good-neighborhood, and good manners, and to be decent, industrious and inoffensive in their respective stations." (4 Bl. Com. 162.)

"The police power of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good-neighborhood which are
33 calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as it is reasonably consistent with a like enjoyment of rights by others." (Cooley, Cons. Lim. 572.)

"'Government and municipal law protect and develop, rather than create, private rights. The conservation of private rights is attended by the imposition of a wholesome restraint upon their exercise, of such a restraint as will prevent the infleition of injury upon others in the enjoyment of them. * * * The power of the government to impose this restraint is called Police Power. By this general police power of the state, persons and property are subject to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state; of the perfect right in the legislature to do which no question ever was or upon acknowledged general principles ever can be made so far as natural persons are concerned.'" (Tiederman on Police Power, Vol. 1, Sec. 1, p. 2.)

"That the police power in its broadest acceptation means the general power of a government to preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety and welfare of society, and establishing such rules and regulations for the conduct of all persons and the use and management of all property as may be conducive to the public interest." (22 A. & M. Ency. (2d Ed.) p. 916.)

"Police power is the name given to that inherent sovereignty which it is the right and duty of the government or its agents to exercise whenever public policy in a broad sense demands, for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure in any respect such economic conditions as an advancing civilization of a highly complex character requires." (8 Cyc. p. 863.)

34 In that great and leading case of Munn vs. Illinois, 94 U. S., 113, it is held:

"Under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property."

In State ex rel. vs. Mercantile Company, 184 Mo., l. c. 184, Marshall, J., speaking for this court in banc, said:

"In the exercise of its police power the State may pass any law which is designed to suppress or punish a wrong, to mitigate an evil, to preserve the peace, health, morals, good order and general welfare of the community. For no person has an absolute right to engage in any business which contravenes these purposes."

"This (police power) is an extensive and undefined power. A power to preserve the peace, promote good morals, restrain vice and protect the property and health of the people."

State vs. Searcy, 20 Mo. 490.

"From its very nature, the police power is a power to be exercised within wide limits of legislative discretion; and if a statute appears to be within the apparent scope of this power, it would be a usurpation of jurisdiction for the courts to inquire into its wisdom and policy or to undertake to substitute their discretion for that of the Legislature."

State vs. Addington, 12 Mo. App. l. c. 221.
State vs. Beattie, 16 App. Mo. 131.
Cearfoss vs. The State, 44 Md. 403.

"It cannot be claimed that parties have the right to make
35 any and all contracts they deem proper. The State has made
and may properly make many regulations that will restrict this right. For instance, we have usury laws, and their validity is unquestioned. Parties are not permitted to insert certain conditions in insurance contracts which would be perfectly legitimate, but for statutory prohibition. Yet the courts sustain these provisions and declare ineffectual any attempt by contract to evade or nullify the statutes."

Judge Williams in Karnes vs. Insurance Company, 123 Mo. l. c. 417.
Havens vs. Insurance Company, 123 Mo. 403.
Henry County vs. Evans, 97 Mo. 47.
Equitable Society vs. Clements, 140 U. S. 226.

"Any provision of a shipper's contract which limits the time in which suit for injury to stock shall be brought, if that limit is less than the time fixed by statute, is void. Nor is such statute unconstitutional."

Richardson vs. C. & A. Railroad Co., 149 Mo. 311.

The Legislature, in the act of 1909, has a right to require grain, seed, hay or coal to be made on the basis of the actual weight of such properties, and prohibit sales or contracts made on anything less than the actual weights.

The act is not special legislation. It applies to and affects all members of the same class—that is, every person or persons engaged in buying or selling the properties mentioned.

State vs. Swagerty, 203 Mo. l. c. 523.
State vs. Cantwell, 179 Mo. 205.

So much for the general law of police power and police regulation.

36 Now, let us look at the act under which petitioner is prosecuted as a concrete regulation by the State enacted under and by virtue of the State's police power.

II.

Act Constitutional.

(1) The act in question is presumed to be constitutional until the contrary is clearly shown.

In the case of Ex parte Loving, 178 Mo. l. c. 203, Fox, J., speaking for the court, said:

"In the solution of the proposition before us, we must keep in view the familiar principle that, if there is a reasonable doubt existing as to the constitutionality of the act, such doubt must be resolved in favor of its validity. This principle is so well recognized that the mere statement of it is sufficient. In State ex rel. vs. Aloe, 152 Mo. 477, it was very clearly and tersely stated:

" 'When the validity of a statute is drawn in question, the court approaches the subject as one involving the gravest responsibility, and to be considered with the greatest caution. The General Assembly is presumed to have been as careful to observe the requirements of the Constitution in enacting the statute as the court in applying it. Every presumption is to be indulged in favor of the validity of the act, and that presumption is to continue until its invalidity is made to appear beyond a doubt.'

"To the same effect is State ex rel. vs. Pike County, 144 Mo. 277, where it is said:

" 'It is the duty of the courts to uphold a legislative act unless it plainly and clearly violates the Constitution, and if its language is susceptible of a meaning that will remove the objections to its
37 validity, such interpretation should be adopted. 'A legislative intent to violate the Constitution is never to be assumed if the language of the statute can be satisfied by a contrary construction.' (Endlich on the Interpretation of Statutes, Sec. 178.) It is our duty to uphold the act unless it plainly and clearly violates the fundamental law of the State, and, if its language is susceptible of a meaning that will remove the objections to its validity, such interpretation should be adopted.' "

To the same effect are the following cases:

State vs. Cantwell, 179 Mo. l. c. 261.
State vs. Aloe, 152 Mo. l. c. 477.
State ex rel. vs. Railroad, 48 Mo. l. c. 471.
Atchison vs. Andrews, 174 U. S. 96.

(2) Where there is doubt as to the constitutionality of an act it will be resolved in favor of the validity of the enactment.

Ex parte Loving, 178 Mo. Supra.
State vs. Cantwell, 179 Mo. Supra.
County vs. Griswold, 58 Mo. 192.
State vs. Able, 65 Mo. 357.

III.

Analysis of the Act.

The first section of said act reads:

"Every sale of grain, seed, hay or coal shall be made on the basis of the actual weight thereof, and any purchaser of grain, seed, hay or coal, who shall deduct any amount from the actual weight or measure thereof under claim of right to do so by reason of any custom
38 or rule of a board of trade or any pretense whatsoever, shall be deemed guilty of a misdemeanor, and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each and every offense."

The second section of said act reads:

"No agent or broker selling any grain, hay or coal shall have authority, under claim or right to do so by reason of any custom or rule of board of trade, to sell any grain, seed, hay or coal only on the basis of the actual weight thereof, and any contract of sale of any grain, seed, hay or coal made in violation of this act shall be null and void."

The whole act, stripped of its verbiage, and "boiled down," simply means this:

First. That all sales of grain, seed, hay and coal in this State shall be made on the basis of their actual weight.

Second. That any purchaser of grain, seed, hay or coal, who shall deduct any amount from the actual weight or measure thereof, under claim of right to do so by reason of any custom or rule of a board of trade or any pretense whatsoever, shall be guilty of a misdemeanor and punished by fine.

Third. That no agent or broker shall have any authority by reason of any custom or rule of a board of trade, to sell any grain, seed, hay or coal, except on the basis of the actual weight thereof, and any sale made in violation thereof shall be null and void.

Petitioner is charged with the violation of the second part of said section*al*, which is the penal part of said act.

IV.

Act Prevents Fraud.

The act under consideration in no particular respect seems to us to be an "invasion of the liberty of the citizen" as contended by petitioner.

39 The act was not leveled against the right to contract in any manner or form.

No one can gainsay but that the State under its police power has the right to prevent fraud generally, in any transaction, and especially in weights and measures of the commodities of life.

Mr. Freund, in his work on Police Power, states the rule to be:

"The private and the criminal law, as well as the police power, undertake to afford protection against fraud. They deal, however, with fraudulent practices only by remedial relief, treating a transaction as void or setting it aside, giving a claim for damages or inflicting a penalty after the fraud has been committed. In either case, the element of fraudulent intent is essential. The police power attempts to give an ampler protection, both by adopting precautionary measures and by forbidding certain practices irrespective of an actual intent to defraud. It does not in the first instance punish fraud, but prescribes regulations and punishes their violation. The intervention of the law proceeds upon the theory that every one who invites the confidence of the public may be compelled to submit to such regulations as will guard the public as far as possible against misapprehension. Where the confidence of the public is invited to an exceptional degree, the regulations may be made specially stringent, on the ground that the business is affected with a public interest, so in banking and insurance."

* * * * * * *

"The earliest legislation for the prevention of fraud relates to weights and measures. It goes back to Anglo Saxon times,
40 and forms part of Magna Charta. The Constitution of the United States provides for uniformity of weights and measures by giving Congress power to fix their standard; but Congress has enacted no compulsory legislation in execution of this power. It merely has passed an act authorizing the use of the metric system; and the Federal government supplies the several states with certain standard weights and measures as a matter of favor and accommodation under a resolution of Congress of June 14, 1836. Until superseded by act of Congress, the regulation of weights and measures, therefore, devolves upon the states, and is provided for by state legislation."

This court will take judicial notice of the fact, which is common knowledge to all, that the great bulk of the grain and other commodities named in the act, are sold on the exchanges of the large cities of this State.

The farmer or merchant who ships his grain to such markets is entitled to receive pay for the same on the basis of the actual weight thereof.

We dare say that no farmer or merchant who ships his grain to such markets is familiar with the rules of either board of trade of the cities, such as are set out in the agreed statement of facts. They ship their grain to commission men expecting to receive pay for the same on the actual weight thereof.

The act is intended to inculcate honesty in the great commercial transactions which take place on such stock exchanges, and to do away with the arbitrary taking of one's property without pay and without his consent so to do.

The act was passed to prevent frauds in the sale of such commodities, and it also tends in a large measure to the well-being of the State to prevent false weights and measures.

41 In Bacon vs. Walker, 204 U. S. l. c. 317, it is said in reference to police power:

"These cases make it unnecessary to consider the argument of counsel based upon what they deem to be the limits of the police power of a State, and their contention that the statute of Idaho transcends those limits. It is enough to say that they have fallen into the error exposed in Chicago, Burlington & Quincy Railway Company vs. Drainage Commissioners, 200 U. S. 561, 592. In that case we rejected the view that the police power cannot be exercised for the general well-being of the community. That power, we said, embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. We do not enter, therefore, into the discussion whether the sheep industry is legitimate and not offensive. Nor need we make extended comment on the two-mile limit. The selection of some limit is a legislative power, and it is only against the abuse of the power, if at all, that the courts may interpose. But the abuse must be shown. It is not shown by quoting the provision which expresses the limit. The mere distance expressed shows nothing. It does not display the necessities of a settler upon the public lands. It does not display what protection is needed, not from one sheep or a few sheep, but from large flocks of sheep, or the relation of the sheep industry to other industries. These may be the considerations that induced the statutes, and we cannot pronounce them insufficient on surmise or on the barren letter of the statute."

42 In State ex rel. vs. Savings & Building Assn., 167 Mo. l. c. 495, Marshall, J., said:

"It is too plain to admit of discussion that criminal statutes leveled against acts that would be frauds without such criminal enactments, and intended for the protection of the rights of the citizen, cannot have the effect of impairing the obligation of contracts or of depriving any man of his property without due process of law."

Mr. Tiedeman, in his admirable work on police power, states the rule as to police power to prevent fraud, as follows:

"A fraud is, of course, a trespass upon another's private rights, and can always be punished, when committed. It is, therefore, but rational to suppose that the State may institute any reasonable preventive remedy, when the frequency of the frauds, or the difficulty experienced in circumventing them, is so great that no other means will prove efficacious. Where, therefore, police regulations are established, which give to private parties increased facilities for detecting and preventing fraud, as a general proposition, these laws are free from all constitutional objections. Laws, which provide for the inspection and grading of flour, the inspection of tobacco, the inspection and regulation of weights and measures, the regulation of weight of bread, requiring all lumber to be surveyed by a public surveyor, providing for the weighing of coal and other articles of heavy bulk on the public scales, are constitutional exercises of police power, so far as they permit one party to compel the other to comply with the regulation, in the absence of their agreement to the contrary. 43 For example, it is permissible for a statutory regulation to provide for standard weights and measures, and to compel their use, when the parties have not agreed upon the use of others."

* * * * * * *

The regulation is in most cases made absolute, and the observance of it is obligatory upon all. Thus it has been held that a city ordinance may require hay or coal to be weighed by city weighers. Of the same character, is the New York law, which provides that the sale of oleomargarine, or other products resembling butter, shall be prohibited, unless the box or other receptacle, in which it is kept, shall have the true name of the article plainly stamped upon it. The object of the law is the prevention of fraud and is a reasonable police regulation.

* * * * * * *

In the preceding section, a number of regulations, for the purpose of preventing fraud in the sale of goods, wares and merchandise, have been explained, and their constitutionality elucidated. Fraud is, of course, hydra-headed, and threatens every business relation in life. And the only constitutional question, which can be raised, in respect to legislation which is designed to prevent and punish fraud in intra-State transactions, is whether the regulations go no farther than is necessary to prevent or punish the fraud, and do not infringe any vested rights, which can be enjoyed without the commission of the fraud." (pp. 260-263.)

In People vs. Wagner, 86 Mich. l. c. 599-600, it is said:

"The State may institute any reasonable preventive remedy when
the frequency of the frauds, or the difficulty experienced by
44 individuals in circumventing them, is so great that no other
means will prove efficacious."

* * * * * * *

The police power of a state is not confined to regulations looking to the preservation of life, health, good order and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objection."

V.

Right of Contract Not Abridged.

The act, as it is drawn, in no way attempts to abridge or limit the right of contract. The act would be valid, we think, even if it went farther and prohibited the making of any contract for the taking of another's property by any arbitrary rule, and not paying anything therefor.

The right of contract is always subject to certain limitations, which the State may lawfully impose in the exercise of its police power. This is a well recognized rule.

In State vs. Cantwell, 179 Mo. l. c. 269-70, Fox, J., said:

"It is very earnestly insisted, in fact, the very able presentation of this case, by counsel for appellant, is principally predicated upon the contention that the law upon which this prosecution is founded, infringes upon the liberty of the citizen to contract. This contention is very clearly answered by the court in Holden vs. Hardy, supra, where the principle is forcibly and unqualifiedly announced that even the right to contract is subject to reasonable limitations, when the public interests demand it. This principle was thus clearly stated:

'This right of contract, however, is itself subject to certain
45 limitations which the State may lawfully impose in the exer-
cise of its police power. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held, notably in the cases of Davidson vs. New Orleans, 96 U. S. 97, and Yick Wo vs. Hopkins, 118 U. S. 356, that the police power cannot be put forward as an excuse for oppressive and unjust

legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, and a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.' " (Lawton vs. Steele, 152 U. S. 133, 136.)

Again, in State ex rel. vs. Mercantile Company, 184 Mo. l. c. 186, Marshall, J., said:

"The fact that the act limits the absolute right of the defendant to contract, even if it was true, which it is not, would not make the act invalid. In civilized society there is no such thing as an absolute right to do as one pleases. Certain acts are made criminal by law; others are prohibited as being *mala in se* or *mala prohibita;* all acts are limited by the equal right of others to do as they see fit, which necessarily produces a modification upon the rights of both, for the exercise of both would be incompatible and impossible. So 46 the right to contract is limited by the laws herein referred to as regulating many classes of business. The law favors the right of every man to freely make honest and legal contracts, but it prohibits any man to make swindling contracts, and punishes him in one way or another if he so does. The right every man has to contract is, therefore, limited by the consideration that the contract must be an honest one and a legal one, and the right to the other party to expect such a contract must not be impaired."

The taking of the hundred pounds of wheat by petitioner by reason of rule 18 of the Board of Trade, of which petitioner is a member, is a "swindling contract" as to the owner of the grain, who did not consent to the taking of the hundred pounds, nor did he authorize his broker or agent to give the hundred pounds by reason of said rule 18. From the agreed statement of facts, it clearly appears that the owner of the grain had a right to expect, and did expect, to receive pay for the same on the basis of its actual weight. It is stated in the agreed statement of facts that "nothing had been said between the member selling (agent) and his principal (owner of the grain) as to the allowance of one hundred pounds." (pp. 5 & 6.)

In the case of State vs. Snow, 81 Ia. l. c. 445-6, in discussing the right of the Legislature to enact a certain statute regulating the sale of lard, the court said:

"If it resembles lard, it is surely no infringement of any right of the groceryman or dealer to require him to make known to the public, in a proper manner, the constituent parts of the article which he offers for sale. Such a law is clearly within the police power of the State. It is said in the case of City of Council Bluffs vs. Railway Co., 45 Iowa, 338: 'We fully recognize the doctrine that the State, 47 by virtue of its police power, may enact all such laws as may be necessary or proper to protect its citizens in their persons, health and property, to guard them against fraud, impositions and oppressions, even where such laws may, in some respects, affect persons or corporations engaged in the transportation of foreign or interstate commerce, such as quarantine and health laws, all laws to prevent the commission of felonies, misdemeanors or other breaches of the peace.' It is apparent, from an analysis of the act under consideration, that it is not an infringement of the right of any citizen. Its provisions are, in substance, just this: If a dealer offers for sale an article intended to be used for lard, he must label it so that the public may not be deceived or defrauded by paying the value of pure lard for a cheaper article."

VI.

Act Reasonable.

The provisions of the act under consideration are reasonable and a valid exercise of the police power.

As was said by Judge Fox in the Cantwell case, supra, (l. c. 272), quoting from a leading case of the Supreme Court of New York on this point, *said:*

"'Generally it is for the Legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts.'"

The agreed statement of facts in this case show that both the broker (who sold the grain for his principal to petitioner) 48 and petitioner were members of the Board of Trade of Kansas City; that the broker had not been given authority by his principal (the owner of the grain) to give the 100 pounds by reason of rule 18 of said Board of Trade. The act makes null and void any agreement on the part of the broker to give the 100 pounds by reason of such rule or custom. The admitted facts show the act has been violated.

In re Martin, 101 Pac. Rep. 1006, a statute very similar to ours in its provisions, came before the Supreme Court of Kansas for consideration. It is to be regretted the case went off on a question of fact, and the constitutionality of said act was not passed upon by the court.

Time and space forbids an extended review of laws held to be within the police power, and, which by analogy, may be helpful to a proper construction of the act under consideration. A few will serve to point the rule.

In City of St. Charles vs. Elsner, 155 Mo. 671, this court held that a city of the third class had the power to regulate the business of a dealer in coal by requiring his coal to be weighed on the public scales, and to impose a charge therefor.

In City of Lamar vs. Weidman, 57 Mo. App. 507, the Kansas City Court of Appeals held that a city of the fourth class, by proper ordinance, might require all products for sale, or offered for sale, within its limits, to be weighed and certified to by the weighmaster of such city.

In State vs. Wilson, 61 Kan. 32, the Supreme Court of that state held valid an act passed by the Legislature, and known as the "Screen

Law," requiring all coal to be weighed, when mined, by the bushel, or weight, before passing the same over a screen.

In People vs. Wagner, 86 Mich., 594, the Supreme Court of that state held valid an ordinance of the city of Detroit providing that all bread manufactured by the bakers of said city for sale, should 49 be made into loaves of one, two and four pounds, and no other, and forbidding them to sell or expose for sale any bread that should be deficient in weight.

In Yates vs. The City of Milwaukee, 12 Wis. 673, the Supreme Court of that state held valid an ordinance of said city forbidding, under a penalty of not less than five nor more than ten dollars, the exposing of any load of hay for sale in certain wards of the city without first having such load weighed by the attendant of some established and sealed city hay scale, and obtaining from him a certificate of the weight, and which certificate was to be exhibited to the purchaser of the hay before receiving payment therefor.

In Stokes & Gilbert vs. The Corporation of the City of New York, 14 Wendell's Reports, 87, an ordinance of the City of New York, requiring anthracite or hard coal to be weighed by weighers appointed by the city, was held to be a valid law as a police regulation.

In The City Council of Charleston vs. James Rogers, 2 McCurd's Reports, 495, the city ordinance requiring the measure of coal by an inspector when sold within the city limits, was held to be a valid police regulation.

In Eaton vs. Kegan, 114 Mass., 433, a statute of the state of Massachusetts, providing that all contracts for the sale and delivery of oats and meal should be bargained for and sold by the bushel, was held to be a valid statute as a police regulation.

The court, in the last case cited, said:

"By Gen. Sts. c. 49, Sec. 63, in all contracts for the sale and delivery of oats and meal,' the same shall be bargained for and sold by the bushel.' Section 64 provides that a bushel of oats shall be thirty-two pounds, and a bushel of meal fifty pounds. The statute does not in terms prohibit other sales, or attach a penalty to the violation of this provision. But it does in terms direct and prescribe in 50 what mode the contract for the sale and delivery of oats and meal shall be made: that they shall be bargained for and sold by the bushel. Not following this direction is equivalent to disobeying a prohibition. Miller vs. Post, 1 Alton, 434. This form of contract is enacted for the benefit of the buyer, and is the legal mode of selling such commodities. The case finds that the plaintiff did not follow the direction of the statute in his sales. Having bought meal and oats himself by the bag, without opening or weighing, he sold them to the defendant. The mode of sale being prescribed, it was illegal to disregard it, and he cannot recover for the articles so sold." (1 c. 434.)

In Conclusion.

The rule which petitioner sets forth deducts an arbitrary amount, to wit, 100 pounds, from each and every car, irrespective of the fact of whether or not it actually contains any dirt or foreign substance.

He justifies the rule on the ground that 100 pounds would be an *average amount.*

If A shipped a car of grain to B free from a particle of dirt or foreign matter, 100 pounds of grain would be deducted just the same. A loses 100 pounds of grain for no reason, and for which he receives no compensation, and based on no less ground of right than the statement that the next shipper may ship a car containing 200 pounds of dirt or foreign matter.

Thus 100 pounds of grain is taken from the man that had no dirt, and the man that actually had 200 pounds of dirt has a deduction of 100 pounds. In this way and under this rule, to even the matter, A must lose 100 pounds of grain because the next shipper had 200 pounds of dirt.

51 The law was enacted so as to protect the man whose wheat was clean, and in order that he should be paid for the actual weight of his commodity, and prevent the arbitrary deduction of 100 pounds, and for which he receives no return. It prevents a man who has a large quantity of dirt in his wheat from compelling some other person whose wheat contains no dirt, from bearing part of his loss, if loss there should be.

The act simply compels the purchaser to pay for that which he gets. That the property be bought and sold on its *actual weight.*

The law will not prevent the purchaser from taking the actual weight of the dirt and foreign substance from the actual weight of the car. If the purchaser knows the *actual weight of the dirt* it can be taken from the car weight. The law simply requires him to pay for the actual weight of the commodity and does not require him to pay for dirt or any other foreign substance, which he may show was actually present. The law is leveled only at the arbitrary reduction.

The petitioner says it takes his property without due process of law. The petitioner is mistaken. He has the matter turned around. The act prevents him from taking the other fellow's property without due process of law and without giving him a return for it.

This law does not prevent the purchaser from separating the dirt and foreign substance from the grain, and only pay for the grain, but on the other hand permits and directs him so to do, because it only requires him to pay for the actual weight of the commodity he purchases.

The petitioner quibbles on the word "fraud" used in the title to the act, and attempts to justify the rule on the ground that the way he gets the 100 pounds is not really a fraud. That he may get the 100 pounds of grain and not pay any consideration for it; that he may take the grain in any way or manner he pleases just so it is not a fraud under his definition of fraud, and he would not be

52 within the terms of the act. That he could label his facts and his acts by some other name than fraud, and he would by this species of sleight of hand be relieved.

It is shown by the agreed statement of facts that the State Railroad and Warehouse Commission has in force a rule requiring all cars unloaded at Kansas City, to be cleanly swept.

It is further shown by the agreed statement of facts that before grain is sold on the Kansas City market it is graded. One of the considerations in grading is the dirt and foreign matter in the grain.

The object of the Act is a just one. It recognizes the princip*al* of honest dealing and condemns false weights, as denounced by the Proverbist: "A false balance is abomination to the Lord; and a just weight is his delight."

Petitioner argues long and loud, that under the present custom of the board of trade, he cannot know whether he is dealing with the agent or broker of a third party, or with the member directly. It will be but little trouble for the Board of Trade, of which petitioner is a member, to amend its rules to conform to the requirements of the Act, making proper provisions for all sales, when made by its members, when acting as agents or brokers for third parties.

We respectfully contend that the Act is constitutional; that it is a valid and wholesome police regulation; that it is aimed to prevent fraud in the sale of the commodities named in the Act; that it should be held constitutional, and that petitioner should be remanded to the charge of the Marshal of Jackson county.

All of which is respectfully submitted.

ELLIOTT W. MAJOR,
Attorney-General.
JOHN M. ATKINSON,
Assistant Attorney-General.

52*a* And thereafter, to-wit, on October 29th, 1909, the court made and entered of record, the following.

FRIDAY, *October* 29, 1909.

Court met pursuant to adjournment.
All the Judges present, except Burgess, J.

Ex Parte R. J. HOUSE, Pet.,
v.
JOEL MAYES, Resp.

Come now the said parties, by attorneys, and after arguments herein, submit the cause to the court.

And thereafter, to-wit, on November 20, 1909, petitioner filed his printed abstract, brief and argument, in words and figures, as follows:

53

In the Supreme Court of Missouri.

No. —.

In the Matter of the Application of R. J. House for Writ of Habeas Corpus.

Original Proceedings.

Abstract and Brief and Argument for Petitioner.

Statement.

On September 22, 1909, your petitioner was arrested in Jackson County, Missouri, by Joel B. Mayes, county marshal, under a citation issued from the Criminal Court of Jackson County, on an information filed the day previous. This information was in due form and alleged that upon September 1, 1909, your petitioner had 54 bought a carload of wheat in Kansas City, Missouri, and from the weight thereof had deducted one hundred pounds under claim of right so to do, because of a custom or rule of the Board of Trade of Kansas City, Missouri, which deduction was alleged to be in violation of an act entitled: "An Act to Prevent Fraud in the Purchase and Sale of Grain and Other Commodities" (Laws of 1909, p. 519).

An application for a writ of *habeas corpus* was that day presented to the Circuit Court of Jackson County and denied, whereupon application was made to the Honorable Chief Justice in Chambers for such a writ, which was granted September 23, 1909.

Respondent Mayes has made return to the writ, setting forth the arrest under the authority above set forth.

55

Agreed Statement of Facts.

"Without admission of either party as to the relevancy of any particular fact herein set forth, the following facts are agreed between the parties:

There are competitive grain markets at Galveston, Texas; Chicago, Illinois; Omaha, Nebraska; Atchison and Wichita, Kansas; and St. Louis, St. Joseph and Kansas City, Missouri. That Kansas City is a primary grain market. That a very slight difference in price or condition will influence the market course of grain.

That the Board of Trade of Kansas City, Missouri, is a voluntary organization of buyers and sellers of grain and provisions, supported by dues and assessments and maintained for the purpose of furnishing a marketing place where such persons can meet and, under rules of safety and convenience, transact such business. Its objects are:

" 'To maintain a Board of Trade to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in business; to facilitate the speedy adjustment of business disputes; to inspire confidence in the business methods and integrity of the parties hereto; to collect and disseminate valuable commercial and economic information, and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits, and to promote the general welfare of Kansas City.'

Its members are governed by rules and regulations, enacted by the members, and which form part of the written contract of association between them.

56 This organization provides for the exclusive use of its members a trading floor where grain is bought and sold only under and according to said rules. Three of said rules are:

" 'SEC. 16. The weight Supervising Committee shall have supervision, through the Weight Department, of the unloading of all cars unloaded at all elevators, mills, warehouses, transfer and team tracks, within the jurisdiction of this Board and shall cause the same to be thoroughly swept and cleaned when unloaded. Sweeping or cleaning of cars subsequently by any operator or employé of any elevator, mill, warehouse, transfer or team tracks, or by any person or persons under agreement with the same; or the buying or receiving of any such sweepings or cleanings by any member of this Association is prohibited.

'SEC. 17. Violations of any of the provisions of Section 16 of this article shall subject the member so violating to a fine of $50.00 for the first offense, to a fine of $100.00 for the second offense, to expulsion and forfeiture of membership for the third offense.

'SEC. 18. On all grain bought by members of the Kansas City Board of Trade, and on which Kansas City unloading weights are given, an allowance of one hundred pounds per car shall be made to the buyer, to cover loss on account of dirt and other foreign matter.'

That said board of trade maintains a bureau of weights, which strictly enforces rule 16.

That rules 16 and 17 were enacted to secure to the seller the full weight of the entire contents of the car and rule 18 to secure the buyer from loss through dirt and foreign matter in or swept out with the grain, which was unloaded at Kansas City. Before grain is sold it is graded. One of the considerations in grading is the dirt and foreign matter in the grain. Experience had shown that there is a loss from dirt and foreign matter, varying with different cars, which is not fully taken care of in the grade. That there is no method in use of accurately determining the percentage of such foreign matter and dirt and the one hundred pound quantity was taken as a fair average.

57 The members of said Board of Trade buy and sell sometimes as commission men for outsiders and sometimes for their own account and it is impossible to tell without inquiry whether a buyer or seller is acting for himself or for someone else. The buying and selling of grain on the floor of said Board of Trade is, as in all other markets, based upon the constantly and rapidly fluctuating market prices in that and the other principal grain markets. There is no time nor opportunity to ascertain the capacity

(principal or agent) in which a member is acting when he buys or sells, if he be in reality acting as agent, no opportunity to investigate the financial standing of the real principal. Because of this condition and also to secure the prompt and faithful performance of all such contracts of sale, there is a rule of said Board of Trade forbidding the disclosure of outside principals and holding the member in all cases as the principal. There are also rules making a membership responsible for the faithful performance of such contracts.

That the State Railroad and Warehouse Commission has in force a rule requiring cars unloaded at Kansas City to be cleanly swept.

That the method of making the reduction is to weigh the loaded car; then after emptying and cleanly sweeping the car, to weigh the car; the difference in these two weights is entered on the account sales as the weight of a carload of grain, the deduction of one hundred pounds being also noted on that slip and settlement made for this balance. That is, the weight of the entire contents of the car is shown and also the one hundred pound deduction on the face of the account sales given the seller.

That upon the first day of September, 1909, your petitioner bought upon the trading floor of said Board of Trade and from a member thereof, a carload of wheat on Kansas City unloading weights. In accordance with the above method and under said rule 18, he deducted one hundred pounds and made settlement for the balance.

The member selling this grain did not own it, but was acting as a commission man. He, however, dealt with your petitioner as in his own right and your petitioner had no notice or knowledge that such seller was not the real owner of the grain. Nothing had
58 been said between the member selling and his principal as to the allowance of the one hundred pounds.

Both your petitioner and the seller understood at the time of sale that it was made subject to this rule.

FRANK HAGERMAN,
KIMBROUGH STONE,
Attorneys for Petitioner.
ELLIOTT W. MAJOR,
Attorney General;
JOHN M. ATKINSON,
Assistant Attorney-General;
For the State."

59 *Brief and Argument.*

The Law is Invalid.

The law is invalid as an unauthorized invasion of the liberty of the citizen. It is true that the liberty protected by the national and state constitutions is not the freedom of license. It is the freedom of organized society. The state is not infringing upon that liberty when it exercises its police power to confine the freedom of the individual for the protection of the state or of the safety, health, morals or welfare of the general public.

The objects of the police power can be stated only in a general way, but as such may be defined to be the protection of the safety, health, morals or welfare of the general public. Adair v. United States, 208 U. S., 161, 173; 52 L. Ed., 436, 442.

But the legislature can interfere with the liberty of the citizen only insofar as is necessary to accomplish these ends, for there is a limit beyond which it may not go in the regulation of the affairs of the individual. It cannot through the guise of an exercise of the police power invade that liberty of the citizen which the fundamental law has declared to be unassailable. State v. Julow, 129 Mo., 163; Lochner v. New York, 189 U. S., 45; 49 L. Ed., 937.

While large discretion is necessarily vested in the legislature to
determine what the interests of the public require and what
60 measures are necessary to protect those interests, yet to jus-
tify the state in interposing its authority in behalf of the public, it must appear that the interests of the *public generally* require such interferences, and also that the means used for the accomplishment of that purpose are reasonably necessary and not unduly oppressive upon individuals; for "Where the ostensible object of an enactment is to secure the public comfort, welfare or safety, it must appear to be adapted to that end; it cannot evade the rights of person and property under the guise of a mere public regulation, when it is not such in fact; and where such an act takes away the property of a citizen or interferes with his personal liberty, it is the province of the courts to determine whether it is an appropriate measure for the promotion of the comfort, safety and welfare of society." Judge Fox, State v. Cantwell, 179 Mo., 245 at 263.

The United States Supreme Court has also laid down this rule that "the legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupation." Lawton v. Steele, 152 U. S., 133, 136; 38 L. Ed., 385, 388.

The foremost text writer upon this subject has, from a careful examination of all the authorities, drawn the same rule as follows:

"In considering the validity of an enactment of a state legislature under the police power, the inquiry is whether the regulation or classification has been designated to subserve some reasonable public purpose or is a mere device or excuse for an unjust discrimination, or for the oppression or spo*il*ation of a particular class. Any regu-
lation of the internal affairs of the state, fairly subserving a
61 valid police purpose and reasonably exercised for the benefit
of the community at large, will be upheld; but if it be arbitrary and have no substantial relation to the health morals, peace, or welfare of a community, it will be nullified."

Guthrie's Fourteenth Amendment, p. 76.

Citing Yick Wo v. Hopkins, 118 U. S., 356, 368; Minnesota v. Barber, 136 U. S., 313; Collins v. New Hampshire, 171 U. S., 30, 34.

To the courts is left the final determination as to whether there is any public interest served by an enactment and whether the enactment is unusual, unnecessary or unreasonable, for, as said by Mr. Justice Harlan in Smyth *v.* Ames (169 U. S., 466 at 527; 42 L. Ed., 819 at 842):

"The idea that any legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no rights secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty by the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depends, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

Also see State v. Cantwell, 179 Mo., 245.

And while the courts in arriving at this determination will indulge every *reasonable* presumption in favor of the legislative
62 enactment, yet they do so in light of the facts that the protection of the constitutional rights of the citizen is the primary object of our form of government and that,

"It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health and welfare are, in reality, passed from other motives."

Lochner v. N. Y., 198 U. S., 45 at 53; 49 L. Ed., 937 at 944.

They will examine the condition of affairs which the statute was designed to correct or prevent with a view of ascertaining whether that condition could reasonably be regarded of such a vicious nature as to authorize the interference of the legislature. And where the alleged object of the law is not the protection of life or health and where its inevitable result will be to alter a course of business dealing between parties *sui juris*, the courts will closely scrutinize the enactment to prevent the power of the state being employed to help one class of citizens when dealing with another class in a harmless transaction.

Your petitioner urges that in the present instance no public interest or purpose has been served, that neither the safety, health, morals nor welfare of the public has been protected, but that his private business rights—his liberty to contract—have been arbitrarily interfered with in an unnecessary and unreasonable manner.

The alleged purpose of this act was to prevent fraud. Its title is:

63 "An Act to Prevent Fraud in the Purchase and Sale of Grain and Other Commodities."

The manner in which the law seeks to prevent this alleged fraud is to make it a crime for any purchaser of grain, seed, hay or coal to "deduct any amount from the actual weight or measure thereof under claim of right to do so by reason of any custom or rule of a Board of Trade or any pretense whatsoever."

Obviously the statute regards a deduction by the purchaser from the weight of grain under a custom or rule of a Board of Trade as a fraud requiring legislative prevention. Plainly if no semblance of fraud is present in such a transaction, if the deduction is based upon sound and fair business conditions, then the legislature cannot prevent such a practice merely by declaring it fraudulent. It is, therefore, of controlling importance for the court to determine whether the facts surrounding the transactions at which the law aimed are such as to justify legislative police interference on the ground of prevention of fraud.

Fraud cannot exist without deception. There can be no fraud where no one is or can be deceived. The facts of the present case, which are not only typical of but identical with all transactions within the state where a deduction is made "by reason of any custom or rule of a Board of Trade," show that every circumstance surrounding the deduction is open and a matter of record. There is no concealment and no deceit. It is authorized by a printed rule governing every transaction of a great market. "* * * the
64 weight of the entire contents of the car is shown and also the one hundred pound deduction *on the face of the account sales given the seller*" (Statement p. —). In short, there is no attempt at concealment and every man who deals directly or indirectly in this market has documentary evidence, freely given in the line of business, of the custom and rule. Therefore, there was no ground for attacking such a transaction because of fraud growing out of any concealment.

There is just as little reason for interference on the theory that there is fraud in the transaction because there is no real ground for making the deduction, although it may be made openly. The facts show that the rule is the result of what both buyers and sellers in a great market have determined to be a just rule to govern their sales in that market. It was enacted by them "to secure the buyer from loss through dirt and foreign matter in or swept out with the grain which was unloaded at Kansas City," and "the one hundred pound quantity was taken as a fair average" of the "loss from dirt and foreign matter, varying with different cars, which is not fully taken care of in the grade," because "there is no method in use of accurately determining the percentage of such foreign matter and dirt." (Quotations are from Statement of Fact, page —.)

Another consideration bearing upon the non-existence of this alleged fraud is that if any grain were being fraudulently taken, this law would have been unnecessary, for whether the ground or excuse for dockage was a custom or a rule of a Board of Trade, it could never be a defense for either a civil or a criminal action
65 unless incorporated in the contract of sale, otherwise the one making the deduction would be guilty of larceny or embezzlement, as well as civilly liable.

There must be some "reasonable ground" for the legislative interference or it cannot be justified.

State v. Vandiver, 121 S. W., 45, l. c. 59-60 (Mo., 1909);
State ex rel. Standard Oil Co., 218 Mo., 1, l. c. 379;
Lumber Co. v. Railroad, 216 Mo., 658, l. c. 675;
Lohse Co. v. Fuelle, 215 Mo., 421, l. c. 453, 458, 459;
City of St. Louis v. Glover, 210 Mo., 502, l. c. 512;
City of St. Louis v. De Lassus, 205 Mo., 579, l. c. 586-7;
State v. Weber, 205 Mo., 36, l. c. 47;
State ex rel. v. McIntosh, 205 Mo., l. c. 615;
State ex rel. v. Miles, 210 Mo., 127, also 188;
City of St. Louis v. Dairy Co., 190 Mo., 464, l. c. 485;
City of St. Louis v. Dairy Co., 190 Mo., 492, l. c. 504;
State v. Lower, 185 Mo., l. c. 92, 99;
State v. Tie Co., 181 Mo., 536, l. c. 555, 557, 558;
State v. Cantwell, 179 Mo., 245, l. c. 263, 265, 272, 278;
66 City of St. Louis v. Packing Co., 141 Mo., 375.
Wisconsin R. R. Co. v. Jacobson, 179 U. S., 287, at 301; 45 L. Ed., 194 at 201;
Lochren v. New York, 198 U. S. 45; 49 L. Ed., 937;
Adair v. United States, 208 U. S., 161, at 173; 52 L. Ed., 436, at 442;
Ritchie v. People, 155 Ill., 98.

"Reasonable," as used in this connection, has been well defined in the case of Bonnett v. Vallier (Wis.) 116 N. W., 885, 17 L. R. A. (n. s.), 486, at 492, as follows:

"Reasonable as applied to a law is manifestly not what extremists upon the one side or the other would deem, in the light of the principles referred to and the situation to be dealt with, fit or fair. It is what, 'from the calm sea level,' so to speak, of common sense, applied to the whole situation, is not illegitimate in view of the end to be attained. In determining that, the court must look to the language of the statute and to all the facts bearing on the situation of which it may properly be said to judicially know because of their common nature or otherwise. People ex rel. Kemmler v. Durston, 119 N. Y., 569, 7 L. R. A., 715, 16 Am. St. Reports, 859, 24 N. E., 6; Schollenberger v. Pennsylvania, 171 U. S., 1-8, 43 L. Ed., 50-52, 18 Sup. Ct. Rep., 757."

Another definition is given in State v. Redmon (Wis.), 114 N. W., 137, 14 L. R. A. (n. s.), 229 at 236, as follows:

"The doctrine that the police power is really a law of necessity forms the key, it would seem, with which to unlock the mysteries, so far as is practicable, of what is within and what is without the limitsof such power. Not that a police regulation in form or pretense,
to be one in fact, must supply some absolute essential to the
67 public welfare, but that the exigency to be met must so con-
cern such welfare—be sufficiently vital thereto—as to suggest
some reasonable necessity for a remedy affordable only by a legitimate enactment, as to efficiently invite public attention thereto, it

being regarded as a legislative function to primarily pass upon the matter. * * *

"In general, as before shown, all police regulations must bear the judicial test of reasonableness under all the circumstances. This doctrine is being more and more emphasized as the number of police regulations multiply, evincing a tendency to fence in individual freedom as to matters not formerly so narrowed by legislative enactments."

The legislature cannot declare to be fraudulent that which in its nature is not fraudulent.

St. Louis v. Galt, 179 Mo., 8, l. c. 18;
State v. Julow, 129 Mo., 163, l. c. 175, 177.

The declared purpose of this law is to prevent fraud but absolutely no ground for supposing the presence of fraud exists, on the contrary, the entire absence of such ground is shown.

The truth is that the statute was in fact drawn and designed to benefit one class at the expense of another.

Despite its general language, this law was aimed at one thing and that alone. It was intended to abolish the hundred pound deduction in carload grain sold on the floor of the Board of Trade of Kansas City, Missouri. Certain elevator men, not members of the Board of Trade, nor grain raisers, nor producers, nor even citizens of the state, knew that they could not send their grain to that market and escape a dockage on the carload for dirt in the grain and car.
68 One of the Board of Trade rules permitted the hundred pound dockage. They were exclusively sellers in that market. They wished the benefit of the rule which gave them the weight of the entire carload—wheat, dirt and foreign matter—as wheat, but they wished to escape the deduction for dirt and foreign matter. They wished to avail themselves of the market afforded by the Board of Trade and to take advantage of the rules of that market which favored them and to have declared criminal those rules which were unfavorable to them.

They knew that sales upon the market floor of the Board of Trade must of necessity be upon the sole responsibility of the members who take part in the transaction. There is no time to investigate whether the member who offers to buy or sell is acting for himself or some one else, and if the latter, who the principal is, his financial responsibility and the exact extent of the agent's authority. The Board of Trade rules provide for the punishment by fine or expulsion of members who do not fulfil their contracts and obligations and the value of a membership itself is placed behind every transaction a member makes. Nor does a member who is buying or selling for outsiders care to give every other member the names of his patrons. Thus experience has taught that for business and disciplinary reasons it is imperative that the members be in all cases regarded as the principals and held as such by other members in all market purchases or sales. It was the thorough knowledge on the part of the
69 framers of this law of the great importance of this attitude that made them require in this law that no "rule of a Board

of Trade" should justify a dockage and that no agent shall be presumed to have authority to sell according to such a rule. In short, to escape fine or imprisonment the buyer must find out *before* he buys whether the other member is acting for himself or another, and if for another, the exact terms of his agency, and the financial responsibility of his principal—things which would take so much time and investigation that the entire method of dealing in great markets would have to be revolutionized. And they knew that no one market could revolutionize the method of dealing in the grain markets of the world. The authors figured that when faced with the difficulty of the situation, coupled with the risk, and when compelled to alter completely the trading machinery necessary to transact the business of a great market which must conform to the methods of the world's markets or go out of existence, the members of Boards of Trade subject to the statute would prefer to forego the dockage. If it was not for this one and single purpose that the law was passed why is the *buyer* the only one penalized? Why is not the seller penalized if he, as agent without authority, makes for his principal the contract forbidden by the statute? All because the sole object of the statute was to make it as difficult, burdensome and dangerous as possible to take the dockage.

The only possible result the law could have, if any, would be to compel the buyer of grain to accept it upon terms which are different from those which obtained when the parties were left to do their own bargaining.

79 It is the necessary operation—the natural and reasonable effect of a statute, that determines not only the motives of the legislature, but the validity of the law. Henderson v. New York City, 92 U. S., 259, 268; 23 L. Ed., 543, 547; Soon Hing v. Crowley, 113 U. S., 703, 710; 28 L. Ed., 1145, 1147; Mulger v. Kansas, 123 U. S., 623, 661; 31 L. Ed., 205, 210 and State of Minnesota v. Barber, 136 U. S., 313; 34 L. Ed., 455, 457, where Mr. Justice Harlan, delivering the opinion of the court, said:

"The presumption that this statute was enacted, in good faith, for the purpose expressed in the title namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may by its necessary operation, be destructive of rights granted or secured by the constitution. In such cases the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. This principle of constitutional interpretation has often been announced by this court."

Assuredly it is serving no public interest for the state to aid either party in an ordinary commercial sale by restricting the freedom of the other party.

There was no proper place for this statute—no proper work for it to perform. Such a law is, therefore, unnecessary and unreason-

able, serving no public purpose or interest. On its face this law is
intended to hamper the making of such contracts and it does of
necessity do so. It thus interferes with those who desire to
71 enter into such contracts, and being unnecessary and with-
out public purpose, it is an unlawful interference with that
liberty guaranteed by the national and state constitutions.

The following are instances of laws held invalid because unreasonable interferences with liberty of citizen in conducting his business:

Statutes which made unlawful contracts of employment forbidding membership in labor unions have been universally held void

State v. Julow, 129 Mo., 163;
People v. Marcus, 189 N. Y., 257; 77 N. E., 1073;
Gillespie v. People, 188 Ill., 176; 58 N. E., 1007;
Coffeyville B. & T. Co. v. Perry, 69 Kans., 297; 76 Pac., 848;
State v. Bateman, 7 Ohio N. P., 487;
Ex rel. Zillmer v. Kreutzberg, 114 Wis., 530; 90 S. W., 1098;
Goldfield Mines Co. v. Miners' Union, 159 Fed., 500.

Acts requiring stipulations and stipulations in contracts for public work that none but union labor be employed are void:

Atlanta v. Stein, 111 Ga., 789; 36 S. E. 932; 51 L. R. A., 335;
Marshall etc. Co. v. Nashville, 109 Tenn., 495; 71 S. W., 815;
72 Adams v. Brennan, 177 Ill., 194; 52 N. E., 314; 42 L. R. A., 718;
Holden v. Alton, 179 Ill., 318; 53 N. E., 556;
Fiske v. People, 188 Ill., 206; 58 N. E., 985; 52 L. R. A., 291;
State ex rel. Furniture Co. v. Toole, 26 Mont. 22; 66 Pac., 496; 55 L. R. A., 644;
Lewis v. Board of Education, 139 Mich., 306; 102 N. W., 756;
People ex rel. Rodgers v. Coler, 166 N. Y., 1; 59 N. E., 716; 52 L. R. A., 814.

Act requiring public contractor to pay certain minimum wages void.

Street v. Electrical Supply Co., 160 Ind., 338; 66 N. E., 895; 61 L. R. A., 154;
State v. Norton, 5 Ohio N. P., 183.

Acts regulating the time of payment of wages in defiance of contract are held invalid in

Leep v. Ry. Co., 58 Ark., 407, 427; 25 S. W., 75; 20 L. R. A., 264;
Braceville Coal Co. v. People, 147 Ill., 66; 35 N. E., 62; 22 L. R. A., 340;
Railway Co. v. Wilson (Tex.), 19 S. W., 910;
Republic I. & S. Co. v. State, 160 Ind., 379; 66 N. E., 1005;
Commonwealth v. Isenburg, 4 Pa. Dist. R., 579;
Bauer v. Reynolds, 3 Pa. Dist. R., 502.

73 Laws prohibiting payment of laborers otherwise than in money are void.

State v. Loomis, 115 Mo., 307; 21 L. R. A., 789;
State v. Goodwill, 33 W. Va., 179; 6 L. R. A., 621; 10 S. E., 285;
Godcharles v. Wigeman, 113 Pa., 431; 6 Atl., 354;
State v. Hann, 61 Kans., 146; 59 Pac., 340; 47 L. R. A., 369;
State v. Jordan (Tex.), 103 S. W., 633; 11 L. R. A. (n. s.), 603;
Avent Coal Co. v. Commonwealth, 96 Ky., 218; 28 S. W., 502; 28 L. R. A., 273.

Act prohibiting mine owners from dealing in supplies, provisions, etc., held void.

Froer v. People, 141 Ill., 171; 31 N. E., 395; 16 L. R. A., 492.

Act forbidding sale of supplies to employees at greater price than to others *void.*

State v. Fire Creek C. & C. Co., 33 W. Va., 118; 10 S. E., 288.

Act forbidding deduction of wages because of defective work is held void.

Com. v. Perry, 155 Mass., 117; 28 N. E., 1126; 14 L. R. A., 325.

Act to prevent deduction from wages except for actual cash advanced held void.
74 Kellyville Coal Co. v. Harrier, 207 Ill., 624; 69 N. E., 927.

Act requiring employers to give discharged employés written reasons for discharge *void.*

Wallace v. Ry. Co., 94 Ga., 732; 22 S. E., 579;
New York etc. Ry. Co. v. Schaffer, 65 Ohio 414; 62 N. E., 1036.

A general eight hour law held void.

Low v. Rees Printing Co., 41 Neb., 127; 59 N. W., 362.

Statute requiring sleeping-car companies, upon request of occupant of lower birth, to raise upper berth if not occupied, held void.

State v. Redmon (Wis.), 114 N. W., 137, 14 L. R. A. (n. s.), 229.

Act requiring all contractors for erection of buildings to give bond for benefit of material men held void.

Montague & Co., v. Furness, 145 Cal., 205; 78 Pac., 640.

Act forbidding cigar making in tenement houses void.

In re Jacobs, 98 N. Y., 98.

Ordinance regulating weight of loaves of bread.

City of Buffalo v. Collins Baking Co., 39 App. Div. (N. Y.), 432; 57 N. Y. Supp., 347.

Statute giving state board power to refuse or grant nurseryman's
license as it might think applicant "financially responsible"
75 or not, held void, because no reason why such qualification
should be required, hence not within police power to require it.

State ex rel. Hawley v. Nelson (S. D.), 115 N. W., 93; 15 L. R. A. (n. s.), 138.

Act requiring certain bonds to be secured by surety companies as sureties held void.

State ex rel. McKell v. Robins, 71 Ohio, 273; 73 N. E., 470; 69 L. R. A., 427.

Sunday barber act void.

Eden v. People, 161 Ill., 296; 43 N. C., 1108; 32 L. R. A., 664.

Act forbidding use of flag as advertisement.

Ruhstrat v. People, 185 Ill., 133; 57 N. E., 41; 49 L. R. A., 181.

Ordinance prohibiting location of laundry without consent of certain property owners.

Ex parte Sing Lee, 96 Cal., 354; 31 Pac. 245;
Laundry Ordinance case, 13 Fed., 229.

Ordinance prohibiting laundry unless permitted by board of supervisors.

Yick Wo v. Hopkins, 118 U. S., 373; 30 L. Ed., 220.

Act requiring production of certificate showing payment of all taxes due before recording conveyance of real estate.
76 State ex rel. Baldwin v. Moore, 7 Wash., 173; 34 Pac., 461.

Act forbidding sale of groceries and provisions in same store where dry goods, clothing or drugs are sold is void.

City of Chicago v. Nitcher, 183 Ill., 104; 55 N. E., 707.

Act making gift of premium stamps with purchase a crime held void.

People ex rel. Appel v. Zimmerman, 102 App. N. Y., 103; 92 N. Y. Supp., 497;
Madden v. Dycker, 72 App. Div. N. Y., 308; 76 N. Y., Supp., 111.

Act prohibiting selling of any article upon inducement of a premium, held void.

People v. Gillison, 109 N. Y., 397. 17 N. E., 343.

Act requiring mine owners to provide scales for weighing coal and to make the weight of coal the basis of wages, held void.

Millett v. People, 117 Ill., 294; 7 N. E., 631;
In re House Bill No. 203, 21 Col., 27; 39 Pac., 431.

Act requiring payment for coal mining to be based on coal before screened, void.

> Ramsey v. People, 142 Ill., 380; 32 N. E., 364; 17 L. R. A., 853;
> 77 Re Preston, 63 O. St., 428; 59 N. E., 101; 52 L. R. A., 523;
> Also Whitebreast Fuel Co. v. People, 175 Ill., 51; 51 N. E., 853.

In Harding v. People, 160 Ill., 459; 43 N. E., 624; 32 L. R. A., 445, there was a custom among mine owners and miners not to weigh the last car of coal mined each day because that coal was used in the locomotive, the weight being fixed at the average carload weight for the day. The court declared invalid a statute requiring all mine owners, where miners were paid by weight, to weigh *all* cars at the mine, saying:

"This act makes it an offense against the law for any employer and laborer, at any coal mine at which the miners are paid by weight, to determine upon the weight of any miner's car, or any lot of coal, by any other method than that pointed out by the statute. A failure to weigh a car, and to keep a correct record of the weight, renders the operator liable to the penalties prescribed by the act, although he and the laborer may have agreed upon the weight of the car, or contracted for other methods of determining the weight. This is well illustrated by the facts in this case. The last cars that came up in the evening of each day, designed for coaling the locomotives, would not be weighed until the coal was dumped into the tenders, so that the miners could not obtain the weights until the next day, and they wanted them the same evening. For this reason, and at the instance of the miners, it had been the custom for six years to give each miner the weight according to the system above stated. When the company attempted to change this system and weigh the coal, the miners objected, and insisted upon the custom of averaging weights. No objection
78 was ever made by any miner to this manner of arriving at the weight, instead of weighing the cars on the scales. Here was an arrangement, amounting to a contract between the parties with which all the contracting parties were satisfied, and the testimony upon which the plaintiffs in error were convicted came from miners who left during the miner's strike of 1894, and were not again employed by the company. It seems that a law which deprives men engaged in the business of mining from contracting with each other for the purpose of ascertaining the weight of the coal mined, or the amount due them, in any manner mutually satisfactory, cannot be sustained. That such is the effect of this law is the contention of counsel for the people, and it is only upon the assumption that the law does so control the power to contract, that a conviction could have been had in this case; for, as already seen, the parties had contracted otherwise. This act takes away the freedom of contracting by the parties for the ascertainment of the weight of coal, except by a certain method; and in our opinion, it is unconstitutional. The judgment will be reversed, and the cause re-

manded, with direction to the circuit court to discharge the defendants."

Act making it criminal to offer real estate for sale without written authority held void.

Fisher Co. v. Woods, 187 N. Y., 90; 79 N. E., 836; 12 L. R. A. (n. s.), 707.

An act putting onerous restrictions upon keeping of private asylums for insane.

Ex parte Whitwell, 98 Cal., 73; 32 Pac., 870; 19 L. R. A., 727.

In Commonwealth v. Campbell (Ky., 1909), 117 S. W., 383, in declaring void a statute making the possession of intoxicants criminal, the court at p. 387, said:

79 "The theory of our government is to allow the largest liberty to the individual commensurate with the public safety, or, as it has been otherwise expressed, that government is best which governs the least. Under our institutions there is no room for that inquisitorial and protective spirit which seeks to regulate the conduct of men in matters in themselves indifferent, and to make them conform to a standard, not of their own choosing, but the choosing of the lawgivers; that inquisitorial and protective spirit which seeks to prescribe what a man shall eat and wear, or drink or think, thus crushing out individuality and insuring Chinese inertia by the enforcement of the use of the Chinese shoe in the matter of the private conduct of mankind. We hold that the police power—vague and wide and undefined as it is—has limits, and in matters such as we have in hand its utmost frontier is marked by the maxim: *'Sic utere tuo ut alienum non laedas.'* "

For the foregoing reasons, we urge that the petitioner should be discharged.

Respectfully submitted,

FRANK HAGERMAN,
KIMBROUGH STONE,
Attorneys for Petitioner.

And thereafter, to-wit, on March 30, 1910, the court made and entered of record, the following:

Ex Parte R. J. House, Petitioner,
vs.
Joel B. Mayes, Marshal of Jackson County, Missouri, Respondent.

"By the Habeas Corpus Act."

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the petition of the said R. J. House for his discharge be, and the same is hereby denied, and the said petitioner is ordered remanded to the custody of the said respondent; and that the said respondent recover against the said petitioner his costs and charges herein expended, and have therefor execution. (Opinions filed.)

Which said opinions are in words and figures as follow-:

80 In the Supreme Court of Missouri, October Term, 1910.

In Banc.

#15760.

Ex Parte R. J. House for a Writ of Habeas Corpus.

An Act of the General Assembly of Missouri approved June 8th, 1909, is in these words;

"An Act to prevent fraud in the purchase and sale of grain and other Commodities.

"Be it enacted by the General Assembly of the State of Missouri, as follows: Section 1. Every sale of grain, seed, hay or coal shall be made on the basis of the actual weight thereof, and any purchaser of grain, seed, hay or coal, who shall deduct any amount from the actual weight or measure thereof under claim of right to do so by reason of any custom or rule of a board of trade or any pretense whatsoever, shall be deemed guilty of a misdemeanor, and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each and every offense.

Section Two. No agent or broker selling any grain, seed, hay or coal shall have authority, under claim or right to do so by reason of any custom or rule of board of trade, to sell any grain, seed, hay or coal only on the basis of the actual weight thereof, and any contract of sale of any grain, seed, hay or coal made in violation of this act shall be null and void."

On September 21, 1909, the prosecuting attorney of Jackson County by information in due form charged the petitioner with a violation of the above act as follows:

"Now comes Virgil Conkling, Prosecuting Attorney for the State of Missouri, in and for the body of the county of Jackson, and upon his oath informs the court that R. J. House, whose christian
81 name in full is unknown to said prosecuting attorney, late
of the county aforesaid, on the first day of September, 1909, at the county of Jackson, State of Missouri, did purchase, from one James Anderson, one car load of wheat, by weight and did then and there willfully and unlawfully, from the actual weight of said wheat so by him purchased, take and deduct one hundred pounds, he, the said R. J. House, pretending and claiming to have the right to make such deduction, and to have and keep the said one hundred pounds of wheat so deducted free of charge and cost to him under and by virtue of a rule and custom of the Board of Trade of Kansas City, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State."

Under a warrant issued upon this information, the petitioner was arrested and thereafter, on September 23rd, 1909, was granted a writ of Habeas Corpus by the Chief Justice returnable to the October Term of this court, and a return was made on October 12th, 1909, justifying his detention by virtue of the said information and warrant. The cause has been submitted to this court upon the following agreed statement of facts.

Without admission of either party as to the relevancy of any particular fact herein set forth, the following facts are agreed between the parties: There are competitive grain markets at Galveston, Texas, Chicago, Illinois, Omaha, Nebraska, Atchison and Wichita Kansas, and St. Louis, St. Joseph and Kansas City, Missouri. That Kansas City is a primary grain market. That a very slight difference in price or condition will influence the market course of grain.

82 That the Board of Trade of Kansas City, Missouri, is a voluntary organization of buyers and sellers of grain and provisions, supported by dues and assessments and maintained for the purpose of furnishing a marketing place where such persons can meet and, under rules of safety and convenience, transact such business. Its objects are 'To maintain a Board of Trade to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in business; to inspire confidence in the business methods and integrity of the parties hereto; to collect and disseminate valuable commercial and economic information, and generally secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits, and to promote the general welfare of Kansas City.' Its members are governed by rules and regulations, enacted by the members, and which form part of the written contract of association between them.

This organization provides for the exclusive use of its members a trading floor where grain is bought and sold only under and according to said rules. Three of these rules are;

"SECTION 16. The weight supervising committee shall have supervision, through the weight department, of the unloading of all cars unloaded at all elevators, mills, warehouses, transfer and team tracks, within the jurisdiction of this board, and shall cause the same to be thoroughly swept and cleaned when unloaded. Sweeping or cleaning of cars subsequently by any operator or employé of any elevator, mill, warehouse, transfer or team track, or by any person or persons under agreement with the same; or the buying or receiving of any such sweepings or cleanings by any member of this association is prohibited.

SECTION 17. Violation of any of the provisions of section 16 of this article shall subject the member so violating to a fine of $50.00 for the first offense, to a fine of 100.00 for the second offense, to expulsion and forfeiture of membership for the third.

83 SECTION 18. On all grain bought by members of the Kansas City Board of Trade, and on which Kansas City unloading weights are given, an allowance of one hundred pounds per car shall be made to the buyer to cover loss on account of dirt and other foreign matter."

That said Board of Trade maintains a bureau of weight which strictly enforces rule 16. The rules 16 and 17 were enacted to secure to the seller the full weight of the entire contents of the car, and rule 18 to secure the buyer from loss through dirt and foreign matter in or swept out with the grain which was unloaded at Kansas City. Before grain is sold it is graded. One of the considerations in grading is the dirt and foreign matter in the grain. Experience has shown that there is a loss from dirt and foreign matter, varying with different cars, which is not fully taken care of in the grade. That there is no method is use accurately determining the percentage of such foreign matter and dirt, and the one hundred pounds quantity was taken as a fair average. The members of said Board of Trade buy and sell sometimes as commission men for outsiders, and sometimes for their own account, and it is impossible to tell without inquiry whether a buyer or seller is acting for himself or for someone else. The buying and selling of grain on the floor of said Board of Trade is, as in all other markets, based upon the constantly and rapidly fluctuating market price in that and the other principal grain markets. There is no time nor opportunity to ascertain the capacity (principal or agent) in which a member is acting when he buys or sells, and, if he is really acting as agent, no opportunity to investigate the financial standing of the real principal. Because of this condition and also to secure the prompt and faithful performance of such contracts of sale, there is a rule of said Board of Trade forbidding the disclosure of outside principals and holding the member in all cases as the principal. There are also rules making
84 a membership responsible for the faithful performance of such contracts.

That the State Railroad and Warehouse Commission has in force a rule requiring cars unloaded at Kansas City to be cleanly swept.

That the method of making the reduction is to weigh the loaded car; then, after emptying and cleanly sweeping the car, to weigh the car; the difference in these two weights is entered on the account sales as the weight of the carload of grain, the deduction of the one hundred pounds being also noted on that slip and settlement made for this balance. That is, the weight of the entire contents of the car is shown and also the one hundred pound deduction on the face of the account sales given the seller.

That upon the first day of September, 1909, petitioner bought upon the trading floor of said Board of Trade and from a member thereof, a carload of wheat on Kansas City unloading weights. In accordance with the above method, and under said rule 18, he deducted one hundred pounds and made settlement for the balance. The member selling this grain did not own it, but was acting as a commission man. He, however, dealt with petitioner as in his own right, and petitioner had no notice or knowledge that such seller was not the real owner of the grain. Nothing had been said between the member selling and his principal as to the allowance of the one hundred pounds.

Both petitioner and the seller understood at the time of sale that it was made subject to this rule.

The petitioner insists that the above act of the Legislature is void and is an unauthorized invasion of his liberty as a citizen under the Constitution of this State and the Constitution of the United States, in that, it arbitrarily interferes with his right to contract in an unnecessary and unreasonable manner. It will be observed that the information charges an offense under the first section of the act of June 8th, 1909, in that, the petitioner did deduct from the
85 actual weight of a carload of wheat purchased by him on the
first day of September 1909 from James Anderson one hundred pounds under a claim of right to do so under and by virtue of a rule and custom of the Board of Trade of Kansas City, Missouri, contrary to the statute, and under section one of this law this conduct is made a misdemeanor, and the invalidity of the statute is the sale defense to this prosecution. By the agreed state of facts it is admitted that the petitioner bought a carload of wheat from Anderson on Kansas City unloading weights and under the said rule 18 of the Kansas City Board of Trade, deducted one hundred pounds and made settlement for the balance, and that Anderson did not own the grain himself but was acting as a commission man. And that Anderson the member selling the said carload had never derived any authority from his principal, the owner of said carload of wheat, to make such allowance of one hundred pounds. It is however agreed that the petitioner dealt with Anderson in his own right and had no knowledge that Anderson was not the real owner of the grain, but that he and Anderson understood the sale was made subject to rule 18. It further appears from the agreed state of facts, that there is a rule of the said Board of Trade forbidding the disclosures of outside principals and holding the member in all cases as a principal.

Before proceeding further, it is essential to a clear apprehension of the issue involved in this case and to free it of extraneous discussion, that we first understand the nature of the law upon which the prosecution of petitioner is bottomed. The Act is short and can be easily analyzed. Obviously the statute has a two-fold aspect, to-wit a civil, and a criminal side. Thus, in the first sentence of the first section it is declared: "Every sale of grain, seed, hay or coal shall be made on the basis of the actual weight thereof." A failure to comply with this provision is nowhere made penal and it relates only to the civil rights of the parties to a sale or contract of sale. Allied to this civil feature of the Act is the further
86 provision in section two of the act, which provides: "No agent
or broker selling any grain, seed, hay or coal shall have authority *under claim or right to do so by reason of any custom or rule of the Board of Trade*, to sell any grain, seed, hay or coal only on the basis of the actual weight thereof, and any contract of sale of any grain, seed, hay or coal made in violation of this act shall be null and void." So that brought into juxtaposition we have, first: simply a provision that all sales of grain shall be made on the basis of its actual weight, and then, that no broker or agent dealing in grain shall have any authority *by virtue of any custom or rule of board of trade to sell grain* consigned to him or for another, except upon the basis of its actual weight, and if he does, the contract shall

be null and void. There are purely civil features of the law and they are in no sense penal. On the other hand, the statute has a distinct criminal aspect. In the second clause of the first section, it ordains: "Any purchaser of grain, seed, hay or coal, who shall deduct any amount from the actual weight or measure thereof, *under claim of right to do so, by reason of any custom or rule of a board of trade, or any pretense whatsoever,*" shall be deemed guilty of a misdemeanor, and shall be subject to a fine of not less than ten nor more than one hundred dollars for each offense. Thus we have a clearly defined criminal offense, complete in and of itself denounced by the statute and falling fully within the title of the Act.

What then is the question presented to us? Is it the validity of any civil contract as to the weight of grain? Not at all. The defendant is being prosecuted by the State for a violation of the criminal feature of this law, which prohibits him as a purchaser of grain, seed, hay or coal from deducting any amount from the actual weight thereof, *under a claim of right to do so by virtue of a custom or rule of a board of trade.* He has not asserted and does not
87 claim that he has any contract with the seller to deduct the one hundred pounds from the weight of the car of wheat but lays claim to such deduction, *only by virtue of the said rule 18 of the Kansas City Board of Trade*, and this is the offense for which he is being prosecuted. And he claims exemption therefrom, because he says the Act is unconstitutional because it violates his freedom of contract because the statute says *all sales* shall be made on the basis of actual weight. In our opinion the validity of this provision as to actual weight is not involved in this case and this court is not required upon this record to determine the constitutionality of that feature of the Act and defendant is in no attitude to demand a decision thereon because its solution would neither aid or injure him. This court has time and again held that it will not pass upon the Constitutionality of an Act of the Legislature until the rights of some one can be affected by our judgment. State vs. Hathway 106 Mo. l. c. 240; State vs. Seebold 192 Mo. L. C. 730, 731; State vs. McIntosh 205 Mo. l. c. 604. It will be time enough to consider the validity of the civil features of this Act when the validity of some contract as to the weight of grain is involved in some action which requires the determination of the constitutionality of these portions of the act relating to them. They are not involved in this proceeding, which is a prosecution for a violation of the only penal provision in the law and even if invalid would not render the penal clause void because it can stand on its validity and is not dependent upon the others. The legislature in this second clause of section one of the Act denounces and strikes at a custom and a rule of the Board of Trade which arbitrarily assumes a right to take from every shipper of grain, seed, hay or coal one hundred pounds of every carload thereof, sold on said Board, without his knowledge or consent, or if known to him, he is powerless to prevent or obtain any adequate redress. In a concise form, the contention of petitioner is that the General Assembly of this
88 State is powerless to prevent the practice of the Kansas City Board of Trade in taking and appropriating to its members

one hundred pounds of the weight of every carload of wheat purchased by them on said Board of Trade, whether the same be clean or contains dirt, without the knowledge or consent of the consignor thereof, solely by virtue of this rule or pretense to that effect, made by itself, and without other authority, and that the said custom and rule cannot be abrogated by the General Assembly of this State.

That the inspection and regulation of weights and measures are within the police power of the states and laws passed by the legislature for such inspection and regulation requiring dealers and traders to conform thereto and for the appointment or election of officers or inspectors thereunder, are in the nature of police regulation and not repugnant to the Constitution of the United States or of this State can no longer be doubted. Pittsburg Coal Company vs. Louisiana 156 U. S. 590; 30 Amer. & Eng. Ency. of Law (2 Ed.) 451 and cases therein cited. Legislation along these lines is found in almost every country. The underlying purpose of which is to secure uniform weights and measures and to guard the people at large against defective and uncertain weights and measures and fraudulent practices connected therewith. While the Act we are called to construe in this case, is not aimed at fraudulent and illegal weighing of the commodities named therein, it is aimed at practices which are closely akin to fraudulent weighing. State vs. Wilson 61 Kansas 32; Cooley on Cont. Lim. (6 Ed.) 744. Of what benefit would it be to the shipper of grain to the grain markets like KansasCity, to be assured that *their* grain was properly weighed, if after it had been correctly weighed, the toll of one hundred pounds to the carload or any other amount, which the Board of Trade might determine, should be taken without the knowledge or consent of the shippers by virtue of this so-called rule or practice. The result to him will be the same as if fraudulent scales were used by which his grain was made to weigh one hundred pounds less on the carload, without his knowledge or consent.

89 The inhibition of this Act is against the deduction of any amount from the actual weight or measure *under claim of right to do so by reason of custom or rule of the Board of Trade, or by any pretense whatsoever.* This is the unequivocal language of the Act itself, and the agreed statement of facts demonstrates that the Board of Trade by section 18 of its rules claims the right to have an allowance of one hundred pounds per car on all grain bought by the members of the Board of Trade from the Kansas City unloading weights, and in this case, the petitioner deducted this one hundred pounds from the carload of wheat bought by him from Anderson on the first day of September 1909, under and by virtue of this rule 18 *alone*, and not by virtue of any contract made with the shipper whom Anderson represented in the sale, and the agreed statement further shows that Anderson had never apprised his principal of this rule and this custom and obtained his consent to such a deduction from the actual weight of his wheat. Obviously this legislation is aimed at this rule and this custom which the Board of Trade had made for itself.

With all due respect to my brethren who take a different view of this case, I am clearly of the opinion that the Legislature had the right to enact this law to prevent and to abolish this self imposed rule of the Board of Trade and that in so doing, it but exercised a part of the Legislative power of the State to prevent unfair and fraudulent practices in the sale of grain consigned to the Kansas City market. That a custom or usage among merchants or others as to what shall constitute a "ton" or other unit of weight can be abolished by the Legislature has been adjudged wherever that question has been raised. Green vs. Moffett 22 Mo. 529; Evans vs. Myers 25 Penn. St. 114; Noble vs. Darell 3 T. R. 271; St. Cross vs. Howard 6 T. R. 338; Mays vs. Jennings 4 Hun. Tenn. 102; Harris vs. Rutledge 19 Iowa 388.

90 Tiedeman in his work on State and Federal Control of persons and property Vol. 1 page 260, says "A fraud is, of course, a trespass upon another's private rights, and can always be punished, when committed. It is therefore but rational to suppose that the state may institute any reasonable preventive remedy, when the *frequency of the fraud, or the difficulty experienced in circumventing them*, is so great that no other means will prove efficacious. Where, therefore, police regulations are established, which give to private parties increased facilities for detecting and preventing fraud, as a general proposition, these laws are free from all constitutional objections. Laws which provide for the inspection and grading of flour, the inspection of tobacco, the inspection and regulation of weights and measures, the regulation of weight of bread, requiring all lumber to be surveyed, by a public surveyor, providing for the weighing of coal and other articles of heavy bulk on the public scales, are constitutional exercises of police power, so far as they permit one party to compel the other to comply with the regulation, in the absence of their agreement to the contrary. For example, it is permissible for a statutory regulation to provide for standard weights and measures, and to compel their use, when the parties have not agreed upon the use of others." In People vs. Wagner 86 Mich. 594, an ordinance of the city of Detroit providing that all bread manufactured by the bakers of the city for sale, shall be made into loaves of one, two and four pounds and no other and forbidding them to sell or exhibit for sale any bread that shall be deficient in weight, was assailed as unconstitutional, but was sustained by the court. The court saying: "The police power of a state is not confined to regulations looking to the preservation of life, health, good order and decency. Laws providing for the detection and prevention of imposition and fraud as a general proposition are free from constitutional objection." Tiedeman's Limitations of Police Powers section 89 page 208. And it is on this principle that the oleomargarine acts and the milk ordinances of St. Louis and other
91 cities, have been sustained. That the act in this record is
clearly within the police power of the state, we think there can be no doubt. In the first place it aims at nothing but simple, common honesty. But as already said, the provision of the act which petitioner is charged with having violated is that part thereof which prohibits any purchaser of grain from deducting any amount from the actual weight under a claim of right to do so by reason of

any custom or rule of the Board of Trade and it is the rule of the Kansas City Board of Trade at which this act is really aimed. The petitioner claims that this act is unconstitutional because it prohibits him from deducting an arbitrary amount to-wit one hundred pounds from each and every car of grain irrespective of the fact whether or not it actually contains any dirt or foreign substance. While conceding in the agreed statement of facts that there is no method of accurately determining the per-centage of such foreign matter and dirt he assumes that there will be an average of one hundred pounds to each car. He admits that in grading wheat, dirt and foreign matter are taken into account in determining the value of the grain, but the Kansas City Board of Trade have arbitrarily added to this and deducted one hundred pounds from every car, so that if A shipped a car of grain to Kansas City to a member of the Board of Trade, which was entirely free from dirt or foreign matter, under this rule one hundred pounds would be deducted and he loses the value of this one hundred pounds and receives no compensation therefor, but is told that he must submit to this because some other shipper may ship a car load of grain containing two hundred pounds of dirt or foreign matter, thus the grain of A which contains no dirt is taken without compensation and the man who shipped a car load of grain with two hundred pounds of dirt suffers a deduction of only one hundred pounds.

92 When it is considered that Kansas City is one of the great grain markets of the world; that into its elevators and warehouses the wheat and grain from Oklahoma, Kansas and Western Missouri naturally flows to the amount of millions of bushels and that the producers of grain are to a large extent restricted to it as the most accessible, if not practically the only market for the grain of those states, it requires but little calculation to estimate the extent of the toll which this rule 18 of the Board of Trade exacts of the shippers of grain to the commission merchants of that city; neither does it involve any stretch of imagination to see that this toll or deduction from the grain shipped to said city, falls not upon the local shippers in those states but upon the producer whose wheat and other grain must suffer this deduction. When as we know from the general laws of trade and as is admitted by the agreed statement of facts that wheat is graded when offered for sale and that in fixing its grade, the dirt or other substances is taken into account and its value fixed with reference thereto, the arbitrary deduction of one hundred pounds from the weight of each carload of wheat or other grain, whether it be clean or not, struck the Legislature as utterly unreasonable and without justification and that it is but a "pretense" as the statute denominates it, for an unlawful exaction. When it is considered that this exaction falls upon the producer who in the end must suffer the loss, and that it is impracticable for each producer to prevent this wrong, because he must sell on the markets afforded him and must submit to the condition imposed, the injury owing to the large number of producers, is to the public as well as the individual producer. In view of the wide extent of such an exaction, it falls within "the rule that whenever the public (or the law making

power) deems an act of private wrong to be of a nature requiring its intervention for the protection of the individual, it holds the act punishable at its own suit; in other words makes it a crime" 1 Bishop's New Crim. Laws 234. It seems to us that an Act of the Legislature so inherently right in itself according to the laws
93 of fair dealing and morality, needs no extended reasoning to show that it is clearly within the legislative power conferred upon the General Assembly by the constitution. It prohibits merely the taking of one man's property by another without compensation. It imposes no unjust burden upon the purchaser but simply inhibits his deduction from the wheat he purchases, a part thereof which he would take without paying the seller therefor by virtue, not of any agreement with the seller, but by virtue of a rule made by an association of which he is a member.

The business of the Board of Trade and its members in the handling, buying and selling of grain is such that the public has an interest therein and is so largely affected thereby, that legislation controlling it is justifiable, under the decisions of the Supreme Court of the United States in Munn vs. Illinois 94 U. S. 113; Budd vs. New York 143 U. S. 17 and Brass vs. Stoeson 153 U. S. 391.

The legislators regarded the said rule as a pretense, that is to say, a pretext, something held out as real when it is not so, a deception, and accordingly made it a misdemeanor in order to prevent it, and of its power to punish it as such we think there can be no doubt.

Petitioner insists that by prohibiting him from making the deduction on one hundred pounds his property is taken without due process of law. We agree with the Attorney General that he has reversed the conditions. To strike down this act will be to permit him to continue to take the shipper's property without due process of law, and without any compensation therefor.

Without further elaboration, we are of the opinion that this act is a valid one and it is wisely aimed to prevent unjust and unfair practice and to repeal and nullify a rule of the board of trade which is unjust and unfair and contrary to good morals and fair dealings, and the Act offends against no provision of the Constitution.

As to the objection that the Act does not respond to its title, we think it is without merit and weight. We think the act
94 with which the petitioner is charged, to-wit, that of deducting one hundred pounds from the weight of the carload of wheat purchased by him of Anderson, without any other authority than that of rule 18 of the Board of Trade permitting him so to do, aptly falls within the title of the Act, whose purpose is declared therein to prevent fraud in the purchase and sale of grain and other commodities.

It follows from what we have said that the petitioner is not entitled to be discharged from the information in this case and that he should be remanded to the custody of the marshal in order that prosecution may proceed according to law, and it is so ordered.

Burgess, Lamm & Woodson JJ. concur. Woodson J. in a concurring opinion in which Gantt, Burgess & Lamm JJ. concur. Valliant, C. J., Fox and Graves, JJ. dissent. Graves, J. in a dissenting opinion in which Valliant, C. J. & Fox, J. concur. Fox, J. also files dissenting opinion in which Valliant, C. J. & Graves, J. concur.

JAS. B. GANTT, *Judge.*

95 In the Supreme Court of Missouri. In Banc.

(No. 15760.)

In the Matter of the Application of R. J. House for Writ of Habeas Corpus.

I concur in the views of Judge Gantt expressed in this case for the additional reasons that the design the legislature had in passing the act in question was two-fold; first, by section one, to prevent brokers from agreeing with the purchasers of wheat on Boards of Trade from deducting any part therefrom without authority from the owner to so do, notwithstanding the existence of a rule or custom to the contrary. It cannot be seriously contended that said section is unconstitutional for that reason. The books are full of cases upholding the validity of such laws.

The second purpose the legislature intended to accomplish by the passage of this act was to prevent the purchaser of wheat on the floors of exchanges from deducting any quantity from the amount so purchased where the contract of purchase does not authorize such deduction. In other words, the act was simply designed to prevent one person from taking the property of another without compensation and without his consent. That certainly is a valid law, for the reason that it is based upon express provisions of both the State and Federal constitutions, which provide that private property shall not be taken for private use with or without just compensation.

The clear import and meaning of the rule in question is to authorize the purchaser of wheat "on 'change" to take private property without the owner's assent and without compensation, which was being done under this rule at the time of the passage of this act. By the Second Section — this act the legislature intended to prevent that wrongful practice.

In the case at bar, the agreed statement of the facts show- that the broker who sold the wheat mentioned therein had no authority in
fact to authorize House, the petitioner, to deduct the hundred
96 pounds of wheat mentioned from the quantity purchased by
him. Notwithstanding his lack of authority, the petitioner deducted that hundred pounds and now retains it without paying for it. This act of the legislature declares that act of the petitioner to be a misdemeanor and punishable by fine. In my judgment that is a valid law and should be enforced.

Suppose, for instance, the rule in question instead of being simply a rule of the Board of Trade had been an act of the legislature, and had provided just as the rule in effect does, that all purchasers of wheat "on 'change" may without authority from the owners thereof deduct from each car load purchase- the sum of one hundred pounds without compensation, would or could it be contended that such an act would be constitutional? Certainly not. That being true, then clearly the rule itself for stronger reasons is void, and the legislature unquestionably has the authority not only to fine but also to imprison all who take property of others without their consent.

If this Board of Trade has the authority to adopt the rule in question, deducting one hundred pounds from each car load purchase made upon its floors, then clearly by virtue of the same authority it has the power to deduct from each sale two hundred pounds or any other quantity deemed proper, only limited by the avarice and greed of a majority of its members.

In answer to a question propounded by the writer to counsel for the petitioner during the oral argument of this cause, he stated in response thereto that there was sold on an average on the floor of the Kansas City Board of Trade 500 cars of wheat a day. If we deduct from each car of wheat so sold one hundred pounds for each day in the year, it will show that the owners of wheat are annually, by this rule, deprived of three hundred and four thousand one hundred and sixty-six bushels, and that too without their consent and without compensation. If the same rule be extended to St. Louis, St. Joseph and other grain markets of the State, then the quantity will be swollen to probably a million bushels.

97 This rule is wrong and vicious and should be condemned, as the legislature has undertaken to do by this act; and this act is wise and just and should be upheld and enforced. Burgess, Gantt & Lann J. J. concur and Valliant C. J. Fox & Graves J. J. Dissent.

A. M. WOODSON, *Judge.*

98 In the Supreme Court of Missouri, En Banc, October Term, 1909.

No. 15760.

In the Matter of the Application of R. J. House for Writ of Habeas Corpus.

I can not concur in the opinion of the majority, and my reasons therefor are expressed in the following:

By information duly filed on September 21, 1909, by the Prosecuting Attorney of Jackson County, Missouri, R. J. House was charged with the violation of a Legislative act of this State entitled, "An Act to prevent fraud in the purchase and sale of grain and other commodities." Acts of 1909, p. 519. In said information it is charged that he "on the first day of September, 1909, in the County of Jackson, State of Missouri, did purchase from one James Anderson, one car load of wheat by weight, and did then and *and* there wilfully and unlawfully, from the actual weight of the said wheat

so by him purchased, take and deduct one hundred pounds, by the said R. J. House, pretending and claiming to have the right to make such deduction, and to have and keep the said one hundred pounds so deducted free of charge and cost to him under and by virtue of a rule and custom of the Board of Trade of Kansas City, Missouri, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State." Upon this information capias was issued and said House, who is and was a member of said Board of Trade of Kansas City, Missouri, was arrested. Upon his arrest he applied to this Court for a writ of habeas corpus, the object and purpose of which was to test the validity of such
99 Act of the General Assembly. Upon the filing of such application the writ was issued and made returnable at a date named, and return thereto duly made. Counsel, much to be commended, have agreed upon a statement of facts, around which all the legal questions cluster. The statement of facts reads:

"Without admission of either party as to the relevancy of any particular fact herein set forth, the following facts are agreed upon between parties:

"There are competitive grain markets at Galveston, Texas, Chicago, Illinois, Omaha, Nebraska, Atchison and Wichita, Kansas, and St. Louis, St. Joseph and Kansas City, Missouri. That Kansas City is a primary grain market. That a very slight difference in price or condition will influence the market course of grain.

"That the Board of Trade of Kansas City, Missouri, is a voluntary organization of buyers and sellers of grain and provisions, supported by dues and assessments and maintained for the purpose of furnishing a marketing place where such persons can meet and, under rules of safety and convenience, transact such business. Its objects are 'To maintain a Board of Trade to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in business; to facilitate the speedy adjustment of business disputes; to inspire confidence in the business methods and integrity of the parties hereto; to collect and desseminate commercial and economic information, and generally secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits, and to promote the general welfare of Kansas City.'

100 "Its members are governed by rules and regulations, enacted by the members, and which form part of the written contract of association between them.

"This organization provides for the exclusive use of its members a trading floor where grain is bought and sold only under and according to said rules. Three of said rules are:

"SEC. 16. The weight supervising committee shall have supervision, through the weight department, of the unloading of all cars unloaded at all elevators, mills, warehouses, transfer and team tracks, within the jurisdiction of this board, and shall cause the same to be thoroughly swept and cleaned when unloaded. Sweeping or cleaning of cars subsequently by any operator or employé of any elevator, mill, warehouse, transfer or team track, or by any person or persons under agreement with the same; or the buying or receiving of any such sweepings or cleanings by any member of this association is prohibited.

“Sec. 17. Violations of any of the provisions of section 16 of this article shall subject the member so violating — a fine of $50.00 for the first offense, to a fine of $100.00 for the second offense, to expulsion and forfeiture of membership for the third offense.

“Sec. 18. On all grain bought by members of the Kansas City Board of Trade, and on which Kansas City unloading weights are given, an allowance of one hundred pounds per car shall be made to the buyer, to cover loss on account of dirt and other foreign matter.

“That said Board of Trade maintains a bureau of weight
101 which strictly enforces rule 16.

“That rules 16 and 17 were enacted to secure the seller the full weight of the entire contents of the car and rule 18 to secure the buyer from loss through dirt and foreign matter in or swept out with the grain which was unloaded at Kansas City. Before grain is sold it is graded. One of the considerations in grading is the dirt and foreign matter in the grain. Experience has shown that there is a loss from dirt and foreign matter, varying with different cars, which is not fully taken care of in the grade. That there is no method in use of accurately determining the percentage of such foreign matter and dirt, and the one hundred pound quantity was taken as a fair average.

“The members of said Board of Trade buy and sell sometimes as commission men for outsiders, and sometimes for their own account, and it is impossible to tell without inquiry whether a buyer or seller is acting for himself or for some one else. The buying and selling of grain on the floor of said Board of Trade is, as in all other markets, based upon the constantly and rapidly fluctuating market prices in that and the other principal grain markets. There is no time nor opportunity to ascertain the capacity (principal or agent) in which a member is acting when he buys or sells, and, if he be in reality acting as agent, no opportunity to investigate the financial standing of the real principal. Because of this condition and also to secure the prompt and faithful performance of all such con-
102 tracts of sale, there is a rule of said Board of Trade forbidding
the disclosure of outside principals and holding the member in all cases as the principal. There are also rules making a membership responsible for the faithful performance of such contracts.

“That the State Railroad and Warehouse Commission has in force a rule requiring cars unloaded at Kansas City to be cleanly swept.

“That the method of making the reduction is to weigh the loaded car; then, after emptying and cleanly sweeping the car, to weigh the car; the difference in these two weights is entered on the account sales as the weight of the carload of grain, the deduction of one hundred pounds being also noted on that slip and settlement made for this balance. That is, the weight of the entire contents of the car is shown and also the one hundred pound deduction on the face of the account sales given the seller.

“That upon the first day of September, 1909, your petitioner bought upon the trading floor of said Board of Trade and from a member thereof, a carload of wheat on Kansas City unloading weights. In accordance with the above method, and under said rule 18, he deducted one hundred pounds and made settlement for the balance.

"The member selling this grain did not own it, but was acting as a commission man. He, however, dealt with your petitioner as in his own right, and your petitioner had no notice or knowledge that such seller was not the real owner of the grain. Nothing 103 had been said between the member selling and his principal as to the allowance of the one hundred pounds.

"Both your petitioner and the seller understood at the time of sale that it was made subject to this rule."

The full statute reads:

"An act to prevent fraud in the purchase and sale of grain and other commodities.

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"SECTION 1. Every sale of grain, seed, hay or coal shall be made on the basis of the actual weight thereof, and any purchaser of grain, seed, hay or coal, who shall deduct any amount from the actual weight or measure thereof under claim of right to do so by reason of any custom or rule of a board of trade or any pretense whatsoever, shall be deemed guilty of a misdemeanor, and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each and every offense.

"SEC. 2. No agent or broker selling any grain, seed, hay or coal shall have authority, under claim or right to do so by reason of any custom or rule of board of trade, to sell any grain, seed, hay or coal only on the basis of the actual weight thereof, and any contract of sale of any grain, seed, hay or coal made in violation of this act shall be null and void. Approved June 8, 1909."

104 Counsel for Mr. House urge several reasons against the validity of the law, each of which will be noted in the course of the opinion. His counsel ask his discharge, and the State holds that he should be remanded to be tried under the information. Such sufficiently states the cause for a discussion of the legal questions.

I.

We have perhaps set out more of the details in the statement than were required. One point raised is that this law interferes with the sacred right of individuals, *sui juris*, to contract as they please, so long as such contracts are not condemned upon grounds of public morals, public policy and things of like character. The petitioner contends that this right is violated—the State, through the learned Attorney General, contra. The question is not one without difficulties. It can only be determined by an analysis of the law, itself. The question can best be discussed by illustrations. Suppose that a member of this Court desired to buy a wagon load of wheat upon the streets of Jefferson City, and upon examination found

that there was a large amount of foreign substances in said load of wheat, and for that reason demanded that before he would pay the market price of wheat, that a certain per cent of allowance in weight should be allowed for the foreign substances, would the statute prevent a contract of that character? That we would have a right to so contract can hardly be doubted, if the seller was *sui juris.*
105 So, to such a question there can be but one answer and that in the affirmative. No law, relating to the right of contract, can compel the citizen to pay for a thing which he does not get. Nor can a law prescribe the terms of a contract, and thus prevent one of two parties, fully *sui juris*, from getting even a shade the better of the deal of contract. Unconscionable contracts do not fall within this rule. Now, to an analysis of this law, as to whether or not it would effect a contract of the character supposed, *supra.*

The first section of the Statute says that "every sale of grain * * * shall be made on the basis of the actual weight thereof, and every purchaser of grain, * * * who shall deduct any amount from the actual weight or measure thereof under * * * any pretense whatsoever, shall be deemed guilty of a misdemeanor."

The term "any pretense whatsoever" is a broad one. In the use of it reference is made to a sale of a commodity. A sale presupposes a contract of some kind. Under the statute the sale must be upon the basis of actual weight and *a fortiorori* the contract of sale must be likewise. In other words, that which limits the sale must limit the contract with reference to the sale. There can't be a sale, without a contract of sale, and the law which prescribes the terms of one prescribes the terms of the other.

To bring the application closer home, suppose a member of this Court desired to purchase a carload of wheat standing upon
106 the unloading track of a railway company in Kansas City, and after such wheat had been graded, and he upon examination found that there was more foreign substances, including dirt, in the wheat than was accounted for by the grading made, could he then, under this law, contract for the deduction of 100 or 200 pounds from the weight of the car of wheat in order to get actual justice in the bargain? We think not. Under the statute "every sale * * * shall be made on the basis of the actual weight," and to deduct from such actual weight on "any pretense whatsoever" renders a purchaser guilty of a misdemeanor. A sale, as said above, includes within itself a contract of sale. There can be no sale without a contract of sale, and the prohibition really goes to the contract of sale, and prevents "every sale" (not sales upon Boards of Trade solely) from being made under a contract by the terms of which the purchaser can agree to give the market price for wheat provided a reasonable deduction is made for foreign substances.

So, too, if we were purchasing a load of coal upon the streets, much of which load was made up of slate and other foreign substances, we would be guilty of a misdemeanor should we say to the seller we will pay your price provided you deduct 10% of the weight to cover these foreign substances, and the seller accepted our offer thus completing the sale and the contract of sale.

The relator in this case is being prosecuted under Sec-
107 tion 1 of the act, the only criminal section thereof. This
section we have analyzed and when we recollect, as we must, that there can be no such thing as a sale without a contract of sale, we are forced to the conclusion that the words "every sale" used in such section is equivalent to "every contract of sale." Not only so, the section does not limit itself to sales upon boards of trade but it applies to *"every sale"* of the commodities therein mentioned, it matters not when nor where made. This statute clearly strikes at the right of private contract. The first clause compels a purchaser to contract on the basis of the actual weight. Not only so, but it precludes such purchaser from so contracting as to make an allowance for foreign substances. It applies to sales made where there is no grain inspection, as well as places where there is grain inspection. It absolutely leaves the purchasers of grain in small towns and in the country at the mercy of the seller.

The first clause of this statute fixes the terms of every contract of sale so far as the commodities named are concerned. This clause, which we repeat for the present point, reads: "Every sale of grain, seed, hay or coal shall be made on the basis of the actual weight thereof." No cattle feeder buying light chaffy corn, and corn not cleanly shelled, could contract for a greater number of pounds to the bushel under this statute. In this regard the contract between
the two individuals has been fixed by statute. This statute
108 ignores the provisions of the general statute upon weights
and measures. The general statute, Rev. Stats. 1899, sec. 10576, passed when legislative freaks and fads were not in vogue, so far as applicable reads:

"Whenever the articles hereinafter named shall be sold by the bushel, and no special agreement as to the measurement or weights thereof shall be made by the parties, the bushel shall consist of the following number of pounds, viz."

In those days we recognized that persons *sui juris* could contract but in these days it would appear that the state is to assume the right to fix the terms of the contracts between private individuals, whether *sui juris* or not. Under both the State and the Federal Constitutions this power to thus interfere with private contracts is denied. No stronger condemnation of such a law is found than we find from this Court in an opinion by Sherwood, J., in case of State v. Julow, 129 Mo. l. c. 175, whereat it is said:

"Here the law under review declares that to be a *crime*, which consists alone in the exercise of a constitutional right, to wit, that of terminating a contract, one of the essential attributes of property, indeed property itself, under preceding definitions. Brought to the bar of a court on such a charge, the accused would have been *prejudged* in so far as the *criminality* of the act charged is concerned; no question could there be made or admitted as to the quality of the
act; that would have been settled by the previous legislative
109 declaration, and it would only remain to find the fact as
charged, in order to declare the guilt as charged. But the fact as charged as already seen, is *not a crime*, and will not be a crime,

so long as constitutional guarantees and constitutional prohibitions are respected and enforced.

"If an owner, etc., obeys the law on which this prosecution rests, he is thereby deprived of a right and a liberty to contract or terminate a contract as all others may; if he *disobeys* it, then he is punished for the performance of an act *wholly innocent,* unless indeed the doing of such act guaranteed by the organic law, the exercise of a right of which the legislature is forbidden to deprive him can, by that body, be conclusively pronounced criminal. We deny the power of the legislature to do this; to brand as an *offense* that which the constitution designates and declares to — *a right,* and therefore an *innocent act,* and consequently we hold that the statute which professes to exert such a power is nothing more nor less than a "*legislative judgment*" and an attempt to deprive all who are included within its terms, of a constitutional right without due process of law. In support of these views see State v. Loomis, 115 Mo. 307; Com. v. Perry, 155 Mass. 117; Godcharles & Co. v. Wigeman, 113 Pa. St. 431; State v. Goodwill, 33 W. Va. 179; In Re Jacobs, 98 N. Y. 98; People v. Gilson, 109 N. Y. 389; Millett v. People, 117 Ill. 294; Tilt v. People, 27 Chicago Leg. News, 270."

Equally strong is the language of Burgess, J., in the more
110 recent case of State v. Tie & Timber Co., 181 Mo. l. c. 559:

"The right to labor or employ labor, and make contracts with respect thereto, upon such terms as may be agreed upon, is both a liberty and property right, and is included in the guaranty of the Constitution which provides 'that no person shall be deprived of life, liberty or property without due process of law.' (Sec. 30, art. 2, Constitution.) Nor can such right to contract be arbitrarily interfered with, but may be subject to limitations growing out of duties which the individual owes to society, but such limitations must be upon some reasonable basis, and not arbitrarily. (Ritchie v. People, 155 Ill. 98.)"

The section of the statute under review in the Tie & Timber Company case affected the right of an employer to make contracts with his employees. There can be no difference between purchasing labor and purchasing commodities. The right to contract (which is, as said by Sherwood, J., in the Julow case, *supra,* property within the constitutional provisions) is involved in both cases. We use the term purchasing labor, because it is so used by Peckham, Justice, in Lochner v. New York, 198 U. S. l. c. 56. In that case the learned Justice was discussing the effect of a New York law limiting the hours which bakers should work upon the constitutional right to contract. He there said:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dis-
111 pute concerning this general proposition. Otherwise the
Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that — any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation

would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this Court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it — unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

"This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the
state it is valid, although the judgment of the court might
112 be totally opposed to the enactment of such a law. But the
question would still remain: Is it within the police power of the State? and that question must be answered by the Court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act."

The contention of the State in this case is that the law is a reasonable exercise of the police power of the state, but as such we can not so see it. Boiled down to its essence, this law simply says that no contract for the sale and delivery of certain commodities can be made between two persons *sui juris* unless the actual weight of the car load
or other bulk of grain be taken as the basis of the contract.
113 The making of contracts of sale contrary to the provisions of
this act does not affect the safety, health, morals or general welfare of the public—the peculiar wards of the police power. It simply affects private contracts and as such violates both State and Federal constitutional provisions. Speaking of the scope of the police power, Mr. Justice Harlan in Adair v. United States, 208 U. S. l. c. 173, said:

"There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the Courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public."

In the Adair case, *supra*, a Federal statute relating to employer and employé was under consideration. Adair, who was master mechanic of a railway corporation, was charged with having discharged one Coppage because of his connection with a labor organization in violation of the 10th section of the Act of Congress of date October 1, 1888. In discussing this statute under the Constitution, Mr. Justice Harlan in the Adair case, further said:

"While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivations without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business
114 and against his will to accept or retain the personal services of
another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé. It was the legal right of the defendant, Adair, however unwise such a course may have been, to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so, however unwise such a course on his part might have been, to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars, the employer and employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

And so say we in the case at bar. Buyers and sellers of the commodities mentioned in our Statute are upon equal footing. They should have equal rights in the matter of making contracts of purchase and sale. The State is going beyond a reasonable and legitimate exercise of its police power when it attempts to prescribe the terms or any portion of the terms of such contracts between
115 private individuals. Other cases are cited in the briefs, but
we will not further burden this opinion. The very first clause of the statute in question fixes at least one of the terms of every contract of sale as to the commodities mentioned. Such statute is neither a reasonable nor a legitimate exercise of the police power of the state, but in violation of constitutional provisions, as found in both the State and the Federal constitutions, is one which tramples down the rights of the individual to make contracts for himself.

Not only so, but it does this in the interest of one of the contracting parties, and against the interest of the other. Such statutes have universally been declared vicious in character and tendency. For the reasons above expressed we hold the statutes under which the relator is being prosecuted to be void.

II.

There is another reason why this statute should be declared void. The body of the act in nowise responds to the title. The title thus reads: "An act to prevent fraud in the purchase and sale of grain and other commodities." The body of the act as we have shown, simply goes to the character of the contract which must be made between buyer and seller. In its last analysis, the body of the law simply provides that the actual weight of the grain shall be taken
as the basis of the contract of sale, and if the purchaser does
116 not so take it he is guilty of a misdemeanor. There is not a
line in the Act which describes a fraudulent transaction. It is not a fraud for two parties *sui juris* to agree that one will sell and the other will buy a car load of grain, provided that 100 or 200 pounds be taken from the weight to cover loss occasioned by the presence of foreign substances. It is not a fraud for two persons to agree that one will sell and the other buy a wagon load of coal at so much per hundred provided 85 pounds instead of 80 pounds be allowed to the bushel, in order to cover loss from apparent foreign substances in the coal. Yet these are the very transactions involved in the body of this law. There is no reasonable connection between these transactions and the subject matter of fraud. The law therefore does not fall within the purview of the enacting clause or title—and such a law cannot stand.

Nor can the legislature make that a fraud which within itself is not a fraud. To such things the same rule will apply as is applied to nuisances. Speaking to the question of nuisances, this Court in City of St. Louis v. Gault, 179 Mo. l. c. 18, said:

"Of course, even under such broad powers, it is not competent for the city to declare that to be a nuisance which is not, and cannot from its nature, be a nuisance in fact."

And in St. Louis v. Packing Company, 141 Mo. l. c. 383, Gantt, J., said:

"Notwithstanding the broad terms in which the power is given to
declare nuisances, it is not competent for the city to declare
117 that a nuisance which is not so in fact."

If the body of this Act falls within the purview of its title it is because the Legislature has declared that if two parties enter into a contract for the purchase and sale of grain and other commodities on the basis of weights other than the actual weights, such act of the two parties, *sui juris*, is a fraud. The Legislature cannot declare and make that a fraud, which in fact is not a fraud.

Nor can the State make an act criminal when the Constitution permits such act to be done.

State v. Julow, 129 Mo. l. c. 175.

For these reasons the entire act is void.

III.

Learned counsel for the State have analyzed the statute and thus state it:

"The whole act, stripped of its verbiage, and 'boiled down' simply means this:

First. That all sales of grain, seed, hay and coal in this State shall be made on the basis of their actual weight.

Second. That any purchaser of grain, seed, hay or coal, who shall deduct any amount from the actual weight or measure thereof, under claim of right to do so by reason of any custom or rule of a board of trade or any pretense whatsoever, shall be guilty of a misdemeanor and punished by fine.

Third. That no agent or broker shall have any authority by reason of any custom or rule of a board of trade, to sell any grain,
seed, hay or coal, except on the basis of the actual weight
118 thereof, and any sale made in violation thereof shall be null
and void."

He adds, however: "The act was not leveled against the right to contract in any manner or form." At this point the learned counsel tread the pathway of error. The first sub-division of their analysis shows the error. This first subdivision we have discussed above, quoting the exact language of the Act. That part of the Act says that no sale can be made except upon actual weights. No sale can be made without a contract between two parties, *sui juris*. Under this first clause of the statute parties must contract upon the basis of actual weights. If this is not then a statute fixing the basis of a private contract between two persons, *sui juris*, we misconceive what we think to be plain English terms.

If this first clause stood alone, and was not violative of constitutional provisions, no valid sale of the commodities named could be made except on the basis of actual weight, and as all sales presuppose a contract of sale, no valid contract could be made upon any other basis. The more we outline this statute the more firmly fixed become our views to the effect that it is an unwarranted invasion of the personal right to contract. If the State cannot make an act, which is authorized by the Constitution, criminal, it cannot declare fraudulent an act likewise authorized by the Constitution.

So concluding, we think the statute, under which relator was arrested, to be void and relator should be discharged.

Valliant, C. J., and Fox, J., concur—the latter in a separate opinion, in which Valliant, C. J., and the writer concur.

W. W. GRAVES, *J.*

119 In the Supreme Court of Missouri, October Term, 1909.
In Banc.

No. 15760.

In the Matter of the Application of R. J. HOUSE for Writ of Habeas Corpus.

I fully concur in the views expressed by Judge Graves upon the propositions involved in this proceeding; hence will be content with adding a few words concerning the interpretation of section 1, upon which the prosecution of the petitioner was predicated.

Section 1 provides that "every sale of grain, seed, hay or coal shall be made on the basis of the actual weight thereof, and any purchaser of grain, seed, hay or coal, who shall deduct any amount from the actual weight or measure thereof under claim of right to do so by reason of any custom or rule of a board of trade or any pretense whatsoever, shall be deemed guilty of a misdemeanor and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each and every offense."

It is to the provisions of this section that the State must look for support in the prosecution of the petitioner. It is insisted that this section should be divided into sentences and clauses, by reason of which the respective features of the section will be made to appear, that is to say, the civil and criminal aspects embraced in the section.

It is sufficient to say upon this insistence that if that section is divided into sentences or clauses, then it must be done by the court, for manifestly the law-making power did not embrace
120 separate clauses, not even separate sentences. The entire section is embraced within one sentence, and in my opinion can only be construed in its entirety. Clearly the General Assembly sought by the provisions of section 1 to create a misdemeanor concerning the subject of sales of grain, seed, hay or coal, and all the terms employed in that section, have, in their final analysis, application alone to the criminal offense that is sought to be created. The provision of that section that "any purchaser of grain, seed, hay or coal, who shall deduct any amount from the actual weight or measure thereof * * * shall be deemed guilty of a misdemeanor," is embraced in the same sentence and is directly connected with the preceding terms that "every sale of grain, seed, hay or coal shall be made on the basis of the actual weight thereof." In other words, the purchaser as spoken of in the section has reference to a purchaser by reason of a sale made on the basis as provided by the terms last above quoted. There can be no purchaser without a seller, and there can be no sale without a contract, either express or implied, and under the provisions of section 1 the right of the seller and purchaser to make sales is limited to the terms of the statute, that is, the actual weight or measurement, irrespective of what may be the condition of the commodity sold. From this it logically follows that the same limitation upon the right to make

a sale is applicable to and is a burden upon the right to make the contract of sale.

The provision of section 1 which provides that "every sale of grain, seed, hay or coal shall be made on the basis of the actual weight thereof" was not intended by the General Assembly to present simply the civil feature of that section, for manifestly it is the violation of that provision which constitutes the essence of the crime created by section 1. Clearly the purchaser is required under this provision in making his purchase to make it on the basis
121 of the actual weight of the commodity so purchased, and
a failure to comply with the terms of this provision is the essence of the offense created by section 1; and the provision that "any purchaser of grain, seed, hay or coal, who shall deduct any amount from the actual weight or measure thereof," serves only to emphasize that it is the violation of the terms of the statute that every sale shall be made on the basis of the actual weight of the commodity that makes the offense. In other words, section 1 in effect provides that every sale of grain, seed, hay or coal shall be made on the basis of the actual weight, and any purchaser who participates in a sale and who shall purchase upon any other basis than that of the actual weight and measure of the commodity under a claim of right to do so by reason of any custom or rule of a board of trade, or any pretense whatever shall be guilty of a misdemeanor. The provisions of section 1, which provide that "any purchaser * * * who shall deduct any amount from the actual weight or measure thereof," etc., is only pointing out in detail the manner and method of the violation of the requirements of the statute which provide that all sales of certain commodities shall be made upon the basis of the actual weight thereof.

There can be no such thing as a deduction by a purchaser from the actual weight or measure of the commodity purchased without there was a sale and a contract of sale preceding such deduction, and the sale contemplated is the one suggested by the provisions of the statute that must be made upon the basis of the actual weight of the commodity, and, as heretofore indicated, such sale presupposes some sort of a contract, either express or implied, respecting the commodity sold.

In my opinion, as heretofore indicated, the provisions of section 1 must be construed together, and that the terms employed in said section have application to the criminal offense sought to be created by the General Assembly in the enactment of that section.
122 It is next insisted that section 1 has application alone to
sales upon boards of trade. A careful analysis of the provisions of section 1 will demonstrate that its provisions are of much broader significance. It will be observed that this statute in treating of the subject of sales of grain and the other commodities therein mentioned nowhere indicates that it has application alone to sales upon boards of trade. In fact the only instance in which boards of trade are mentioned is that the purchaser cannot justify his deduction from the actual weight of the commodity purchased by reason of any custom or rule of a board of trade or any pretense whatsoever.

In other words, the provisions of that section in substance provide, first, that the sale of the grain shall be upon the basis of the actual weight thereof, and that any purchaser who deducts any amount from the actual weight thereof under claim of right to do so by reason of any custom or rule of a board of trade, or any pretense whatsoever, shall be guilty of the offense provided by that section. That is, that no deduction shall be made by reason of any custom or rule of a board of trade or for any other reason or pretense whatsoever. In other words, the provisions of section 1 are applicable to sales made of the commodities therein mentioned either upon boards of trade or otherwise, and if a purchaser makes a deduction in the weight of the commodity purchased by reason of a custom or rule of a board of trade he is guilty of a misdemeanor, and such purchaser is equally guilty of the offense defined by the statute if he makes a deduction upon the weight of the commodity so purchased at a sale (not upon any board of trade) on any pretense or reason whatsoever.

The solution of the proposition confronting us, that is the proper interpretation of section 1 upon which the prosecution of the petitioner was predicated, must be sought alone by a careful analysis of the terms employed in the statute, and the proposition should
123 not be overshadowed by treating the statute as applicable to the Kansas City Board of Trade and its rules, manner and methods of transacting business.

If this statute invades the rights of the citizens of this State who are fully capable of contracting respecting the sale of their property, then, in my opinion, it should be held invalid. If boards of trade in Kansas City or anywhere else in this State have rules and methods of transacting business that are not in harmony with public interests and morals, doubtless the law-making power will have no trouble in devising some means to regulate them; but their regulation should not be confounded with the rights of the individual citizen who is capable of contracting in the sale and purchase of his property in such manner as his best judgment dictates. In my opinion section 1 should be held invalid.

JAMES D. FOX, *J.*

Valliant, C. J., and Graves, J., concur.

124 And thereafter, to-wit, on April 6th, 1910, the court made and entered of record, the following:

Ex Parte R. J. House, Pet.,
v.
J. B. Mayes, Resp.

Comes now the said petitioner, by attorney, and files his motion for a rehearing herein.

Which said motion of petitioner for rehearing is in words and figures as follows, to-wit:

In the Supreme Court of Missouri.

No. —.

In the Matter of the Application of R. J. House for Writ of Habeas Corpus.

Motion and Suggestions for Rehearing.

Now comes petitioner R. J. House and moves the court to grant a rehearing because:

1. Questions decisive of the case and duly submitted by counsel have been overlooked by the court.

2. The decision is in conflict with controlling decisions to which the attention of the court was through the inadvertence of counsel, not called.

3. If, as assumed, the act upheld is a police regulation, it is void under the Fourteenth Amendment to the Constitution of the United States in that it is an unreasonable exercise thereof. (Lochren v.
N. Y., 198 U. S., 45; State v. Redmond, 134 Wis., 89, 114
125 N. W. Rep., 137.) No sale can be made without a contract.
A contract need not, unless desired, be made under the rules of the Board of Trade. But the right to so make it cannot be denied. Here the agreed facts recite that "Both your petitioner and the seller understood at the time of the sale that it was made subject to this rule."

4. The law interferes with the right to contract and therefore violates the Fourteenth Amendment to the Constitution of the United States. (Adaih v. U. S., 208 U. S., 161; State v. Tie Co., 181 Mo., 536; State v. Cantwell, 179 Mo., 245; State v. Loomis, 115 Mo., 307).

5. (*a*) The vote of Judge Burgess made the majority constitutionally necessary to render the judgment; otherwise a special judge should have been called in. (Constitution, Article 6, Sec. 11). Judge Burgess did not hear the oral argument. In original proceedings here, counsel cannot be denied the right of an oral argument. As Chief Justice Horton (C. K. & W. R. Co. v. Abilene, 42 Kan., 97, 21 Pac. Rep., 1117, 1118) said:

> "If this were an original proceeding in this court in *quo warranto, mandamus,* or *habeas corpus,* I think the decisions already rendered are conclusive that oral argument cannot be denied to either party before judgment. In such cases this court is a trier of facts as well as of law.
>
> Although this is a proceeding in error, and not an original case, I do not think this court, considering the practice in existence at the formation and adoption of the constitution, has the power to deny to any party the right to orally present his case by attorney to this
> court, when the cause is regularly called for hearing. The
> 126 court, however, within reasonable rules may limit the time
> of oral argument, and also require written briefs and abstracts. Oral argument, in reasonable bounds, is helpful and bene-

ficial to the court, and therefore its denial is both injurious to suitors and the court. In my own case, as a general thing, I am much better qualified to decide a case which is submitted to me upon oral argument than upon briefs or abstracts only. A court, pushed and pressed with business as our court is, ought to have all the help, assistance, and benefit that oral arguments can give. At least, I wish it, if the attorneys are willing to furnish it. If the court had the power to deny to suitors the privilege of having their cases argued orally when called for hearing, I would not favor its exercise, as it does not give satisfaction to the profession, or to the parties having cases to be decided. When I was in the active practice, I preferred to argue my jury cases before the jury returned their verdict. I also preferred to argue my law cases to the court before the judgment was rendered against my client. I judge others by myself."

In Bullock v. McGerr, 14 Col., 577, 23 Pac. Rep., 980, 983, 984, Judge Elliott said:

"It is proper, therefore, to state that this court is now, and always has been, of the opinion that it cannot discharge its constitutional obligations to litigants by the promulgation of any opinion, by whomsoever prepared, without first being satisfied of the correctness of the opinion in all substantial particulars; and also that the privilege of being heard orally before the court prior to final judgment is a right which, though subject to reasonable regulation by the court, cannot justly be denied to any party litigant making seasonable application therefor. 'Hear before you strike,' was a maxim of the ancient jurists. Whenever it is necessary that an oral argument should be had in order to a correct understanding and determination of a cause, such necessity is not satisfied by allowing such hearing before the commission; the effect of such oral argument can-
127 not be fully appreciated by the court except the argument be made to the court."

If we have the right to an oral argument before the court, we are entitled to it before every judge who participates in the decision.

(*b*) But if the privilege of oral argument be not one of *right,* still it is something of which a suitor should not be deprived, where, as here, there were four opinions—an equal division of the judges who heard the oral arguments. As in State v. Collins, 70 N. C., 241, the court said:

"'Next to doing right, the great object in the administration of public justice should be to give public satisfaction.' When Sir Walter Raleigh was put on his trial for treason, the judges attempted to stop him in his defense, but he had the manhood to assert his rights. 'My lords,' said he, 'I stand for my life.' Posterity has vindicated him, and condemned his judges."

Respectfully submitted,

FRANK HAGERMAN,
KIMBROUGH STONE,
Attorneys for Petitioner.

Service hereof in due time acknowledged.

—— ——,
Attorney General.

128 And thereafter, to-wit, on April 26th, 1910, the court made and entered of record the following:

Ex Parte: R. J. House, Pet.,
v.
J. B. Mayes, Marshal, Resp.

Now at this day, the court having considered and fully understood the petitioner's motion for a rehearing herein, doth order that the said motion be, and the same is hereby overruled.

And thereafter, to-wit, on April 30th, 1910, the Court made and entered of record, the following:

Ex Parte: R. J. House, Petitioner,
vs.
Joel B. Mayes, Marshal of Jackson County, Missouri, Respondent

"By the Habeas Corpus Act."

Now at this day, there is presented to the Honorable Leroy B. Valliant, Chief Justice of the Supreme Court of Missouri, in chambers, a writ of error to the Supreme Court of the United States; a citation directed to said respondent, citing and admonishing him to appear at the Supreme Court of the United States on the 30th day of May, 1910; an assignment of errors and a bond in the sum of Five Hundred Dollars ($500.00) which said writ of error is allowed, said citation signed and issued, said assignment of errors filed, and said bond approved, ordered filed and made a part of the record herein.

Which said writ of error, citation, assignments of error, and bond, are in words and figures, as follows, to-wit:

129 In the Supreme Court of Missouri. April Term, 1910.

No. 15760.

Ex Parte: R. J. House, Habeas Corpus.

Petition for Writ of Error.

Now comes petitioner, and prays for a writ of error to the Supreme Court of the United States to review the judgment in above entitled cause, an assignment of errors being hereto attached and made part hereof.

FRANK HAGERMAN,
Attorney for Petitioner.

Allowed this 30 day of April, 1910.

LEROY B. VALLIANT,
Chief Justice of the Supreme Court of Missouri.

130 In the Supreme Court of Missouri, April Term, 1910.

No. 15760.

Ex Parte: R. J. House, Habeas Corpus.

Assignments of Error.

Now comes R. J. House, relator herein, and respectfully represents: A judgment was entered in above entitled cause, denying the *commissioner* a writ of habeas corpus, and petition for rehearing timely filed was overruled at the April, 1910 Term. The court in its judgment erred:

1. In holding to be valid and constitutional the act of the legisture of Missouri approved June 8, 1909, and entitled "An act to prevent fraud in the purchase and sale of grain and other commodities."

2. In holding that said act did not interfere either with the petitioner's liberty, his right of contract, or his right to enjoy the gains of his industry, and did not deprive him of liberty and property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

3. In not holding that said act was an unreasonable exercise of the police power, and therefore violative of said 14th amendment.

131 4. In not holding that said act denied to petitioner the equal protection of the law accorded to him by the said amendment.

FRANK HAGERMAN,
Attorney for Petitioner.

132 United States of America to Joel B. Mayes, County Marshal of Jackson County, Missouri, and Elliott W. Major, Attorney General:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington thirty days from and after the date this citation bears date, pursuant to a writ of error filed in the clerk's office of the Supreme Court of Missouri, wherein R. J. House is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Leroy B. Valliant, Chief Justice of the Supreme Court of Missouri, this — day of April, 1910.

LEROY B. VALLIANT,
Chief Justice.

Due service of the within citation accepted on behalf of defendants in error, this 30 day of April, 1910.

ELLIOTT W. MAJOR,
Attorney General.

133 In the Supreme Court of Missouri, April Term, 1910.

No. 15760.

Ex Parte: R. J. House, Habeas Corpus.

Bond.

Know all men by these presents that we, R. J. House, as principal, and Frank Hagerman as surety, are held and firmly bound in the penal sum of five hundred dollars ($500.00) to be paid to the defendants in error, for the payment of which well and truly to be made, we jointly and severally bind ourselves, our successors and assigns firmly by these presents.

The condition of this obligation is such that,

Whereas, in the above case, a judgment has been entered, denying a *a* discharge in Habeas Corpus & remanding petitioner, and it is the desire of the relator to review the judgment and decision of the said court in the Supreme Court of the United States, and a writ of error has been prayed for and allowed to that end;

Now, therefore, if the said R. J. House shall prosecute his writ of error to effect, and answer all costs if he shall fail to make his plea good, then the above obligation to be void; otherwise to be and remain in full force.

134 In witness whereof, the parties hereto have caused these presents to be signed this 30 day of April, 1910.

R. J. HOUSE.
By FRANK HAGERMAN,
His Agent & Attorney.
FRANK HAGERMAN.

The foregoing bond is hereby approved as a supersedeas, this 30 day of April, 1910. LEROY B. VALLIANT,
Chief Justice of the Supreme Court of Missouri.

135 STATE OF MISSOURI, *ss:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri hereby certify that the above and foregoing is a full, true and complete copy of the transcript in the case of Ex parte R. J. House, Petitioner against Joel Mayes, Marshal Jackson County, Respondent, filed in this office September 23rd, 1909 as fully and complete as the same appears of record and on file in my office.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court. Done at office in the City of Jefferson this 25th day of May, A. D. 1910.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk Supreme Court.
FRANK M. LUDWICK, *D. C.*

Endorsed on cover: File No. 22,218. Missouri Supreme Court. Term No. 597. R. J. House, plaintiff in error, vs. Joel B. Mayes, marshal of Jackson county, Missouri, and Elliott W. Major, attorney general. Filed June 8th, 1910. File No. 22,218.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

R. J. HOUSE, Plaintiff in Error.

v.

JOEL B. MAYES, Marshal, et al., Defendants in Error.

In Error to the Supreme Court of the State of Missouri.

Stipulation Perfecting Record.

To avoid suggestion of diminution of record and certiorari to complete same, it is agreed that the record may be treated as amended so as to show that Judge Burgess, one of the Judges of the Supreme Court of Missouri, was not present at, and did not hear the oral argument below, but that he had received the printed briefs and arguments of both plaintiff and defendant at the time of oral argument, the clerk delivering same to him under the practice of the court without notice to either party.

ELLIOTT W. MAJOR,
Attorney for Defendants in Error.
FRANK HAGERMAN,
Attorney for Plaintiff in Error.

[Endorsed:] File No. 22,218. Supreme Court U. S., October Term, 1910. Term No. 597. R. J. House, Pl'ff in Error, vs. Joel B. Mayes, Marshal, et al. Stipulation as to amendment of record. Filed Nov. 10th, 1910.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

R. J. HOUSE, *Plaintiff in Error,* v. JOEL B. MAYES, Marshal of Jackson County, Missouri, and ELLIOTT W. MAJOR, Attorney General, *Defendants in Error.*	No. 597.
THOMAS J. BRODNAX and FRANK E. ESSEX, *Plaintiffs in Error,* v. THE STATE OF MISSOURI, *Defendant in Error.*	No. 598.

Motion by Both Parties to Advance Causes.

Now come plaintiffs in error and defendants in error in each of the above cases, including the real party in interest, the state of Missouri by its attorney general, and respectfully jointly move the court to advance each case for these reasons:

1. The legislature of Missouri passed an act, approved June 8, 1909 (Laws Mo., 1909, p. 519), requiring grain, seed, hay and coal to be sold by actual weight, and prohibiting as a misdemeanor, a deduction of anything from the actual weight or measure there-

of under claim of right so to do by any custom or rule of a board of trade or any pretense whatsoever. In 1907 (Laws Mo., 1907, p. 392), the legislature passed an act requiring all sales of corporate stocks and bonds and of petroleum, cotton, grain and provisions, not at the time actually paid for and delivered, to be evidenced by a writing bearing a twenty-five cent stamp. The act made it a misdemeanor to keep a place wherein was permitted such sales.

2. The Board of Trade of Kansas City, Missouri, and the Merchants Exchange of St. Louis, Missouri, are commercial and trading organizations upon the floors of which are carried on the most tremendous grain business of the Mississippi and Missouri river valleys. The members thereof claim the right, among themselves, to make a deduction in weight to cover alleged losses upon account of dirt and foreign matter which accumulates in the course of transit. Some idea of the extent of a year's business is obtained from this compilation made by the secretary of the Kansas City Board of Trade of the receipt thereat for the year ending June 30, 1910: Wheat, 36,608,000 bushels; corn, 16,533,550 bushels; oats, 5,660,500 bushels; rye, 101,200 bushels; barley, 385,000 bushels; flax, 98,000 bushels; kaffir corn, 714 cars; flour, 158,500 barrels; bran, 20,240 tons; hay, 232,368 tons.

3. Case No. 597 was a test case instituted below by *habeas corpus* (proper practice in the state for the purpose) to determine the validity of the first mentioned act of 1909. The court below, by a vote of four to three (*House* v. *Mayes*, 127 S. W. Rep., 304) upheld the act against the contention that it violated the fourteenth amendment to the constitution, in unreasonably abridging contractual rights, denying the right to petitioner to a discharge.

4. Case No. 598 was a test case instituted to have determined the validity of the stamp tax act of 1907. The supreme court of Missouri affirmed the conviction of plaintiffs in error for a viola-

tion of said act and upheld its validity, one judge dissenting (*State* v. *Brodnax*, 128 S. W. Rep., 177) in favor of the contentions of the plaintiffs in error that it was an attempt to regulate interstate commerce, contrary to section eight, article one of the United States constitution, and was discriminatory, and unreasonably interfered with the freedom of contract, contrary to the fourteenth amendment thereto.

5. Sales upon an exchange are in a measure for future delivery and of grain which is, has been, or will be in transit, so that these laws in some degree affect all the daily transactions upon the great grain exchanges of Missouri.

6. The question in each case is one of such vast importance to the state and to all those who buy or sell grain, and so affects the daily transactions upon the great grain exchanges of the state, that it is the judgment of both parties that each case should be advanced to a speedy hearing. They therefore so request. Each is a criminal case to which the state is a party (Section 949, Rev. Sts. U. S.), and the subject of advancement. If necessary to obtain that result, the parties consent that the two causes may be set for argument at the same time, with the same force and effect as if all the questions were presented by one record.

FRANK HAGERMAN,
Attorney for Plaintiffs in Error.

ELLIOTT W. MAJOR,
Attorney General of the State of Missouri.

Supreme Court, U. S.
FILED.
NOV 25 1910
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D., 1910.

R. J. HOUSE.
Plaintiff in Error,
v.
JOEL B. MAYES, Marshal of Jackson County, Missouri, and ELLIOTT W. MAJOR, Attorney General,
Defendants in Error.

No. 597.

In Error to the Supreme Court of the State of Missouri.

BRIEF FOR PLAINTIFF IN ERROR.

KIMBROUGH STONE,
FRANK HAGERMAN,
Attorneys for Plaintiff in Error.

John C. Bovard, Printer, 782 Baltimore Ave., Kansas City, Mo.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D., 1910.

R. J. HOUSE, *Plaintiff in Error,* v. JOEL B. MAYES, Marshal of Jackson County, Missouri, and ELLIOTT W. MAJOR, Attorney General, *Defendants in Error.*	No. 597.

In Error to the Supreme Court of the State of Missouri.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

1. THE CASE.

This was a test case instituted by *habeas corpus*, proper under the state practice (*Ex parte Neet*, 157 Mo., 527, 537; Joint Motion to advance) for having determined the validity of an act of the legislature (Laws Mo. 1909, p. 519) prohibiting in sales of grain, seed, hay or coal, any deduction under any pretense whatever from the actual weight or measure thereof. An information was filed (Rec., 5, 6) against plaintiff in error in the Criminal Court of Jackson County, Missouri, at Kansas City, charging him with a violation of that act. He sued out (Rec., 1-4) a writ of *habeas corpus* in the Supreme Court of Missouri. A return (Rec., 5) was made and the case tried (Rec., 7-9) upon an agreed statement of facts, resulting in a judgment (Rec., 45) rendered (Rec., 55) by a vote of four judges to three, remanding him to the custody of the marshal. The court was almost hopelessly divided. There were four separate opinions (127 S. W. Rep. 305), those of Judges Gantt (Rec., 46-55) and Woodson (Rec., 55-56) favoring the law, while those of Judges Graves (Rec., 55-56) and Fox (Rec., 67-69) were against its validity. The deciding vote (Rec. 55) was cast by Judge Burgess, who neither sat at nor heard the oral arguments (Stipulation perfecting record).

2. The Law In Question.

The legislature of Missouri in 1909 (Laws Mo. 1909, p. 519) passed an act providing:

> "Section 1. Every sale of grain, seed, hay or coal shall be made on the basis of the actual weight thereof, and any purchaser of grain, seed, hay or coal, who shall deduct any amount from the actual weight or measure thereof under claim of right to do so by reason of any custom or rule of a board of trade or any pretense whatsoever, shall be deemed guilty of a misdemeanor and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each and every offense.
>
> Section 2. No agent or broker selling any grain, seed, hay or coal shall have authority, under claim or right to do so by reason of any custom or rule of board of trade, to sell any grain, seed, hay, or coal only on the basis of the actual weight thereof, and any contract of sale of any grain, seed, hay or coal made in violation of this act shall be null and void."

The sweeping language of the act renders absolutely void every sale of grain, seed, hay or coal not made upon actual weight, and declares any purchaser a criminal who, upon any pretense whatsoever, makes any deduction from the weight or measure thereof. Under the act grain and hay as it stands in the field, or coal as it is located in the earth cannot be dealt in; if dirt or foreign substances become mixed with grain or seed, or weeds with hay, no deduction can be made on account thereof, but the weight of the whole must be the basis of any contract.

3. THE INFORMATION.

The information (Rec., 56) charged plaintiff in error with violating the foregoing act by purchasing a carload of wheat from one James Anderson, and deducting one hundred pounds from its actual weight, claiming the right to do so under a rule and custom of the Board of Trade of Kansas City, Missouri.

4. AGREED STATEMENT OF FACTS.

The proof showed no claim under any custom, but did show a claim of the right to make the deduction by virtue of a written contract between the seller and buyer, as members of the Kansas City Board of Trade, which, as part thereof, contained a paragraph, *called* a rule, to govern the transaction. The case was tried upon an agreed statement of facts (Rec., 7-9) which reads:

> "Without admission of either party as to the relevancy of any particular fact herein set forth, the following facts are agreed between the parties:
>
> There are competitive grain markets at Galveston, Texas; Chicago, Illinois; Omaha, Nebraska; Atchison and Wichita, Kansas; and St. Louis, St. Joseph and Kansas City, Missouri. That Kansas City is a primary grain market. That a very slight difference in price or condition will influence the market cost of grain. That the Board of Trade of Kansas City, Missouri, is a voluntary organization of buyers and sellers of grain and provisions, supported by dues and assessments and maintained for the purpose of furnishing a marketing place where such persons can meet

and, under rules of safety and convenience, transact such business. Its objects are: 'To maintain a Board of Trade to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in business; to facilitate the speedy adjustment of business disputes; to inspire confidence in the business methods and integrity of the parties hereto; to collect and disseminate valuable commercial and economic information, and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits, and to promote the general welfare of Kansas City.' Its members are governed by rules and regulations, enacted by the members, and which *form part of the written contract* of association between them. This organization provides for the *exclusive use of its members* a trading floor where grain is bought and sold only under and according to said rules. Three of said rules are:

'Sec. 16. The weight Supervising Committee shall have supervision, through the Weight Department, of the unloading of all cars unloaded at all elevators, mills, warehouses, transfer and team tracks, within the jurisdiction of this board and shall cause the same to be thoroughly swept and cleaned when unloaded. Sweeping and cleaning of cars subsequently by any operator or employe of any elevator, mill, warehouse, transfer or team tracks, or by any person or persons under agreement with the same, or the buying or receiving of any such sweepings or cleanings by any members of this Association is prohibited.

'Sec. 17. Violations of any of the provisions of Section 16 of this article shall subject the member so violating to a fine of $50.00 for the first offense, to a fine of $100.00 for the second offense, to expulsion and forfeiture of membership for the third offense.

'Sec. 18. On all grain bought by members of the Kansas City Board of Trade, and on which Kansas City unloading weights are given, an allowance of one hundred pounds per car shall be made to the buyer, to cover loss on account of dirt and other foreign matter.'

That said board of trade maintains a bureau of weights, which strictly enforces rule 16. That rules 16 and 17 were enacted to secure to the seller the full weight of the entire contents of the car and rule 18 to secure the buyer from loss through dirt and foreign matter in or swept out with the grain which was unloaded at Kansas City. *Before grain is sold it is graded. One of the considerations in grading is the dirt and foreign matter in the grain. Experience had* *shown that there is a loss from dirt and foreign matter, varying with different cars, which is not fully taken care of in the grade. That there is no method in use of accurately determining the percentage of such foreign matter and dirt and the one hundred pound quantity was taken as a fair average.* The members of said Board of Trade buy and sell sometimes as commission men for outsiders and sometimes for their own account and it is impossible to tell without inquiry whether a buyer or seller is acting for himself or for someone else. The buying and selling of grain on the floor of said Board of Trade is, as in all other markets, based upon the constantly and rapidly fluctuating market prices in that and the other principal grain markets. There is no time nor opportunity to ascertain the capacity (principal or agent) in which a member is acting when he buys or sells, and, if he be in reality acting as agent, no opportunity to investigate the financial standing of the real principal. Because of this condition and also to secure the prompt and faithful performance of all such contracts of sale, there is a rule of said Board of Thade forbidding the disclosure of outside principals and *holding the member in all cases as the principal.* There are also rules making a membership responsible for the faithful performance of such contracts. That the State Railroad and Warehouse Commission has in force a rule requiring cars unloaded at Kansas City to be cleanly swept. That the method of making the reduction is to weigh the loaded car; then after emptying and cleanly sweeping the car, to weigh the car; the difference in these two weights is entered on the account sales as the weight of the carload of grain, *the deduction of one hundred pounds being also noted on that slip and settlement made for this balance.* That is, the weight of the entire contens of the care is shown and also the one hundred pound deduction on the face of the account sales given the seller. That upon the first day of September, 1909, your petitioner bought upon the trading floor of said Board of Trade and from a member thereof, a carload of wheat on Kansas City unloading weights. In accordance with the above method and under said rule 18, he deducted one hundred pounds and made settlement for the balance. The member selling this grain did not own it, but was acting as a commission man. He, however, dealt with your petitioner as in his own right and your petitioner had no notice or knowledge that such seller was not the real owner of the grain. Nothing had been said between the member selling and his principal as to the allowance of the one hundred pounds. *Both your petitioner and the seller understood at the time of sale that it was made subject to this rule.*"

From this statement it is to be observed that the Board of Trade is not a corporation, but a voluntary association, created by a *written contract* between its members, by which it is agreed they will trade under certain rules, exclusively as between themselves, upon a certain trading floor. They, whether principals or commission men, assume personal responsibility for all trades, the same as if personally the buyers and sellers, no outside principal ever being a party to any transaction. One of these rules, or rather contractual provisions, as *between themselves*, provides for the deduction of one hundred pounds in weight from each car load of grain, a sort of liquidated damages to cover all loss, whether great or small, through the accumulations of dirt and foreign matter which always exist. The extent thereof is difficult of ascertainment, and one hundred pounds is a fair average of the deduction which ought to be made. The sum total of offending here was that one member bought from another a carload of wheat, and made the deduction of one hundred pounds, as the two had in their written contract of membership previously agreed, and as both at the time of the sale understood was to be done, there having been noted upon the written account of the sale the extent and character of the deduction.

5. CONSTITUTIONALITY OF THE ACT CHALLENGED.

The act of the legislature was claimed by plaintiff in error (Petition, Rec., 3) to be contrary to the fourteenth amendment to the Constitution of the United States in that it interfered with his right to enter into a contract. Because the case involved this question, a writ of error (Rec., 72-74) was allowed and the case brought here, such being the chief error assigned.

6. OPINIONS OF THE MAJORITY OF THE COURT AND HOW OBTAINED.

(a) The opinions of the majority of the court were delivered by Judges Gantt (Rec., 46-55) and Woodson (Rec., 55, 56) concurred in by Judges Lamm and Burgess, the vote of the latter (Rec., 55) making the majority, although he was not present at, and did not hear the oral arguments (Stipulation perfecting record). The minority opinions, concurred in by Judge Valliant, were delivered by Judges Graves (Rec., 56-66) and Fox (Rec., 67-69). The respective views were so forcibly presented by these opinions, that little remains to be said by counsel for either side in the way of argument.

(b) The opinions of Judges Gantt and Woodson treated the act as if it related to a corporate by-law *arbitrarily* adopted and sought to be enforced against the *seller* without his consent, whereas the Board of Trade was a voluntary association and the rule was part of a *written* contract made between the parties contracting, as buyer and seller, who were members thereof. These opinions also justified the passage of the act as one necessary to prevent fraud, whereas the deduction was one made in the interest of fair dealing, was fair in amount, openly made, was fully understood and actually agreed to by buyer and seller, and noted upon the written account of the sale which passed between them.

(c) Judges Graves (Rec., 56-66) and Fox (Rec., 67-69) filed opinions in which Judge Valliant concurred, expressing in the most forcible terms the conclusion that the act interfered with the individual right of contract. Upon these opinions the case could be rested.

(d) Judge Burgess did not sit at the hearing of the case, yet his voice determined the result of the case. The state constitution (Art. 6, Sec. 11) requires a special judge to be selected by the court wherever there is a tie vote. In the motion for rehearing (Rec., 70) the proposition was unsuccessfully asserted that the right to an oral argument was, in cases like this, *originally* instituted in the supreme court, a constitutional grant of the benefit of which a litigant could not be deprived.

7. ERRORS ASSIGNED.

The judgment of the court below denying to plaintiff in error his discharge was erroneous (Rec., 70, 73) in that:

(a) The act in question as applied to him and the facts of record denied to him the right to make a contract, whereby he was deprived of the protection of the fourteenth amendment to the constitution of the United States:

(b) The protection of that amendment was also denied by Judge Burgess voting to determine a case, the oral argument in which he had not heard.

BRIEF OF ARGUMENT.

I.

The act denies to plaintiff in error the right to contract.

(a) Under the fourteenth amendment, freedom of contract is guaranteed. This is not an open question. In *Allgeyer* v. *Louisiana,* 165 U. S., 578 589, 41 L. Ed. 832, 835, 836, Mr. Justice Peckham of the liberty so guaranteed, said:

> "The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

In *Holden* v. *Hardy,* 169 U. S. 366, 390, 42 L. Ed., 780, 790, Mr. Justice Brown said:

> "As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law, which undertakes to deprive any class of persons of the general power to acquire property, would also be obnoxious to the same provision. Indeed, we may go a step further, and say that as property can only be legally acquired as between living persons by contract, that a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid."

In *Lochner* v. *New York,* 198 U. S., 45, 53 49 L. Ed. 937, 940, Mr. Justice Peckham said:

> "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution."

The doctrine was subsequently restated and enforced in an elaborate opinion by Mr. Justice Harlan (*Adair* v. *U. S.*, 208 U. S., 161, 172, 173, 52 L. Ed. 436, 442), and was below emphasized and sought to be applied by Judges Graves (Rec., 56-66) and Fox (Rec., 67-69).

(b) The act in question clearly comes within the principles laid down in the foregoing cases. Freedom of contract must, of course, yield to the police power of the state. But there is a limit to the exercise of that power. In the end the court must decide the question. In *Mugler* v. *Kansas City*, 123 U. S. 623, 661, 31 L. Ed., 205, 210, Mr. Justice Harlan said:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

Mr. Justice Peckham (*Lochner* v. *New York*, 198 U. S. 45, 56, 57, 61, 49 L. Ed., 937, 940, 941, 943) thus expressed the views of this court upon this subject:

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before

> this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his famliy? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor. This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? And that question must be answered by the court. * * * Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employees, if the hours of labor are not curtailed. If this be not clearly the case, the individuals whose rights are thus made the subject of legislative interference are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the state has no power to limit their right as proposed in this statute."

The doctrine was emphatically restated in *Adair* v. *U. S.*, 208 U. S., 161, 173, 52 L. Ed., 436, 442. No court has spoken more forcibly upon this subject than the Supreme Court of Missouri. Thus, in *State* v. *Julow*, 129 Mo., 163, 175, Judge Sherwood said:

> "Here the law under review declares that to be a *crime*, which consists alone in the exercise of a constitutional right, to-wit: that of terminating a contract, one of the essential attributes of property, indeed property itself, under preceding definitions. Brought to the bar of a court on such a

charge, the accused would have been *prejudged* in so far as the *criminality* of the act charged is concerned; no question could there be made or admitted as to the quality of the act; that would have been settled by the previous legislative declaration and it would only remain to find the fact as charged in order to declare the guilt as charged. But the fact as charged as already seen is *not a crime,* and will not be a crime so long as constitutional guarantees and constitutional prohibitions are respected and enforced. If an owner, etc., obeys the law on which this prosecution rests, he is thereby deprived of a right and a liberty to contract or terminate a contract as all others may; if he *disobeys* it, then he is punished for the performance of an act *wholly innocent,* unless indeed the doing of such act guaranteed by the organic law, the exercise of a right of which the legislature is forbidden to deprive him can, by that body, be conclusively pronounced criminal. We deny the power of the legislature to do this; to brand as an offense that which the constitution designates and declares to be a right, and therefore an innocent act, and consequently we hold that the statute which professes to exert such a power is nothing more nor less than a 'legislative judgment' and an attempt to deprive all who are included within its terms, of a constitutional right without due process of law. In support of these views see *State* v. *Loomis,* 115 Mo., 307; *Com.* v. *Perry,* 155 Mass 117; *Godcharles & Co.* v. *Wigeman,* 113 Pa. St. 431; *State* v. *Goodwill,* 33 W. Va., 179; *In Re Jacobs,* 98 N. Y. 98; *People* v. *Gillson,* 109 N. Y., 389; *Millett* v. *People,* 117 Ill., 294; *Tilt* v. *People,* 27 Chicago Leg. News, 270."

In *State* v. *Tie Co.,* 181 Mo. 536, 559, Judge Burgess said:

"The right to labor or employ labor, and make contracts with respect thereto, upon such terms as may be agreed upon, is both a liberty and property right, and is included in the guaranty of the Constitution which provides 'that no person shall be deprived of life, liberty or property without due process of law.' (Sec. 30, art. 2, Constitution.) Nor can such right to contract be arbitrarily interfered with, but may be subject to limitations growing out of duties which the individual owes to society, but such limitation must be upon some reasonable basis, and not arbitrarily. (*Ritchie* v. *People,* 155 Ill., 98.)"

In *State* v. *Cantwell*, 179 Mo., 245, 263, Judge Fox said:

> "Where the ostensible object of an enactment is to secure the public comfort, welfare or safety, it must appear to be adapted to that end; it cannot evade the rights of person and property under the guise of a mere police regulation, when it is not such in fact; and where such an act takes away the property of a citizen or interferes with his personal liberty, it is the province of the courts to determine whether it is really an appropriate measure for the promotion of the comfort, safety and welfare of society."

In *State* v. *Loomis*, 115 Mo., 307, 316, Judge Black said:

> "Liberty, as we have seen, includes the right to contract as others may; and to take that right away from a class of persons following lawful pursuits is simply depriving such persons of a time-honored right which the constitution undertakes to secure to every citizen."

In this case below (Rec., 63) Judge Graves upon this subject said:

> "The contention of the state in this case is that the law is a reasonable exercise of the police power of the state, but as such we cannot so see it. Boiled down to its essence, this law simply says that no contract for the sale and delivery of certain commodities can be made between two persons, *sui juris*, unless the actual weight of the car load or other bulk of grain be taken as the basis of the contract. The making of contracts of sale contrary to the provisions of this act does not affect the safety, health, morals or general welfare of the public—the peculiar wards of the police power. It simply affects private contracts and as such violates both state and federal constitutional provisions."

There must be some "reasonable grounds" for the legislative interference, or it cannot be justified. In *Bonnett* v. *Vallier*, 136 Wis., 193, 203, 204, 116 N. W., 885, 888, it was by Judge Marshall said:

> "Reasonable, as applied to a law, is manifestly not what extremists upon the one side or the other would deem, in the light of the principles referred to and the situation to be dealt with, fit or fair. It is what 'from the calm sea level,'

> so to speak, of common sense, applied to the whole situation, is not illegitimate in view of the end to be attained. In determining that, the court must look to the language of the statute and to all the facts bearing on the situation of which it may properly be said to judicially know because of their common nature or otherwise. *People ex rel. Kemmler* v. *Durston*, 119 N. Y., 569, 7 L. R. A., 715, 16 Am. St. Reports, 859, 24 N. E. 6; *Schollenberger* v. *Pennsylvania*, 171 U. S., 1-8, 43 L. Ed., 50-52. 18 Sup. Ct. Rep., 757."

In *State* v. *Redmon*, 134 Wis., 89, 110, 114 N. W. Rep., 137, 142, 143, it was by the same judge said:

> "The doctrine that the police power is really a law of necessity, forms the key, it would seem, with which to unlock the mysteries, so far as practicable, of what is within and what is without the limits of such power. Not that a police regulation in form or pretense to be one in fact, must supply some absolute essential to the public welfare, but that the exigency to be met must so concern such welfare—be sufficiently vital thereto—as to suggest some reasonable necessity for a remedy affordable only by a legislative enactment, as to efficiently invite public attention thereto, it being regarded as a legislative function to primarily pass upon the matter. * * * In general, as before shown, all police regulations must bear the judicial test of reasonableness under all the circumstances. This doctrine is being more and more emphasized as the number of police regulations multiply, evincing a tendency to fence in individual freedom as to matters not formerly so narrowed by legislative enactments."

(c) The act in question clearly comes within the principles announced in *Lochner* v. *New York*, 198 U. S., 45, 49 L. Ed., 937, and *Adair* v. *U. S.*, 208 U. S., 161, 52 L. Ed., 436. Judge Graves below (Rec., 59-61, 64-65) said:

> "One point raised is that this law interferes with the sacred right of individuals, *sui juris*, to contract as they please, so long as such contracts are not condemned upon grounds of public morals, public policy and things of like character. The petitioner contends that this right is violated —the state, through the learned attorney general, *contra*. The question is not one without difficulties. It can only be determined by an analysis of the law itself. The question

can best be discussed by illustrations. Suppose that a member of this court desired to buy a wagon load of wheat upon the streets of Jefferson City, and upon examination found that there was a large amount of foreign substances in said load of wheat, and for that reason demanded that before he would pay the market price of wheat, that a certain per cent of allowance in weight should be allowed for the foreign substances, would the statute prevent a contract of that character? That we would have a right to so contract can hardly be doubted, if the seller was *sui juris*. So, to such a question there can be but one answer and that in the affirmative. No law, relating to the right of contract, can compel a citizen to pay for a thing which he does not get. Nor can a law prescribe the terms of a contract, and thus prevent one of two parties fully *sui juris*, from getting even a shade the better of the deal of contract. Unconscionable contracts do not fall within this rule. Now, to an analysis of this law, as to whether or not it would effect a contract of the character supposed, *supra*. The first section of the statute says that 'every sale of grain * * * shall be made on the basis of the actual weight thereof, and every purchaser of grain, * * * who shall deduct any amount from the actual weight or measure thereof under * * * any pretense whatsoever, shall be deemed guilty of a misdemeanor'. The term, 'any pretense whatsoever' is a broad one. In the use of it reference is made to a sale of a commodity. A sale presupposes a contract of some kind. Under the statute the sale must be upon the basis of actual weight and *a fortiori* the contract of sale must be likewise. In other words that which limits the sale must limit the contract with reference to the sale. There can't be a sale, without a contract of sale, and the law which prescribes the terms of one prescribes the terms of the other. To bring the application closer home, suppose a member of this court desired to purchase a carload of wheat standing upon the unloading track of a railway company in Kansas City, and after such wheat had been graded, and he upon examination found that there was more foreign substances, including dirt in the wheat than was accounted for by the grading made, could he then, under this law, contract for the deduction of 100 or 200 pounds from the weight of the car of wheat in order to get actual justice in the bargain? We think not. Under the statute 'every sale * * * shall be made on the basis of the actual weight,' and to deduct from such actual weight on 'any pretense whatsoever' renders a purchaser guilty of a misdemeanor. A sale, as said above, includes within itself a contract of sale. There can be no sale without a contract of sale, and the prohibition really goes to the contract of sale, and prevents 'every sale' (not sales upon Boards of Trade solely) from being made under a contract by the terms of which the purchaser can agree to give the market price for wheat provided a reasonable deduction is made for foreign substances. So, too, if we were purchasing a load of coal upon the streets, much of which load was made up of slate and other foreign substances, we would be guilty of a misdemeanor should we say to the seller we will pay your price provided you deduct 10% of the weight to cover these foreign substances, and the seller accepted our offer thus completing the sale and the contract of sale. The relator in this case is being prosecuted under Section 1 of the act, the only criminal section thereof. This section we have analyzed and when we recollect, as we must, that there can be no such thing as a sale without a contract of sale, we are forced to the conclusion that the words 'every sale' used in such section is equivalent to 'every contract of sale.' Not only so, the section does not limit itself to sales upon boards of trade but it applies to '*every sale*' of the commodities therein mentioned, it matters not when nor where made. This statute clearly strikes at the right of private contract. The first clause compels a purchaser to contract on the basis of the actual weight. Not only so, but it precludes such purchaser from so contracting as to make an allowance for foreign substances. It applies to sales made where there is no grain inspection, as well as places where there is grain inspection. It absolutely leaves the purchasers of grain in small towns and in the country at the mercy of the seller. The first clause of this statute fixes the terms of every contract of sale so far as the commodities named are concerned. This clause, which we repeat for the present point, reads: 'Every sale of grain, seed, hay or coal shall be made on the basis of the actual weight thereof.' No cattle feeder buying light chaffy corn, and corn not cleanly shelled, could contract for a greater number of pounds to the bushel under this statute. In this regard the contract between the two individuals has been fixed by statute. This statute ignores the provisions of the general statute upon weights and measures. The general statute, Rev. Stats. 1899, sec. 10576, passed when legislative freaks and fads were not in vogue, so far as applicable reads: 'Whenever the articles hereinafter named shall be sold by the bushel, and no special agreement as to the measurement or weights thereof shall be made by the parties, the bushel shall consist of the following number of pounds, viz.' In those days we recognized that persons *sui juris* could contract but in these days it would appear that the state is to assume the right to fix the terms of the contracts between private individuals, whether *sui juris* or not. Under both the state and the federal constitutions this power to thus interfere with private contracts is denied. * * * Buyers and sellers of the commodities mentioned in our statute are upon equal footing. They should have equal rights in the matter of making contracts of purchase and sale. The state is going beyond a reasonable and legitimate exercise of its police power when it attempts to prescribe the terms or any portion of the terms of such contracts between private individuals. Other cases are cited in the briefs, but we will not further burden this opinion. The very first clause of the statute in question fixes at least one of the terms of every contract of sale as to the commodities mentioned. Such statute is neither a reasonable nor a legitimate exercise of the police power of the state, but in violation of constitutional provisions, as found in both the state and federal constitutions, is one which tramples down the rights of the individual to make contracts for himself. Not only so, but it does this in the interest of one of the contracting parties, and against the interest of the other. Such statutes have universally been declared vicious in character and tendency."

Judge Fox below (Rec., 68-69) said:

"It will be observed that this statute in treating of the subject of sales of grain and the other commodities therein mentioned nowhere indicates that it has application alone to sales upon boards of trade. In fact the only instance in which boards of trade are mentioned is that the purchaser cannot justify his deduction from the actual weight of the commodity purchased by reason of any custom or rule of a board of trade or any pretense whatsoever. In other words, the provisions of that section in substance provide, first, that the sale of the grain shall be upon the basis of the actual weight thereof, and that any purchaser who deducts any amount from the actual weight thereof under claim of right to do so by reason of any custom or rule of a board of trade, or any pretense whatsoever, shall be guilty of the offense provided by that section. That is, that no deduction shall be made by reason of any custom or rule of a board of trade or for any other reason or pretense whatsoever. In other words, the provisions of section 1 are applicable to sales made of the the commodities therein mentioned either upon boards of

> trade or otherwise, and if a purchaser makes a deduction in the weight of the commodity purchased by reason of a custom or rule of a board of trade, he is guilty of a misdemeanor, and such purchaser is equally guilty of the offense defined by the statute if he makes a deduction upon the weight of the commodity so purchased at a sale (not upon any board of trade) on any pretense or reason whatsoever. The solution of the proposition confronting us, that is the proper interpretation of section 1 upon which the prosecution of the petitioner is predicated, must be sought alone by a careful analysis of the terms employed in the statute, and the proposition should not be overshadowed by treating the statute as applicable to the Kansas City Board of Trade and its rules, manner and methods of transacting business. If this statute invades the rights of the citizens of this state who are fully capable of contracting respecting the sale of their property, then, in my opinion, it should be held invalid. If boards of trade in Kansas City or anywhere else in this state have rules and methods of transacting business that are not in harmony with public interests and morals, doubtless the law-making power will have no trouble in devising some means to regulate them; but their regulation should not be confounded with the rights of the individual citizen who is capable of contracting in the sale and purchase of his property in such manner as his best judgment dictates."

The case is much like *Harding* v. *People*, 160 Ill., 459; 43 N. E., 624; 32 L. R. A., 445, where there was a custom among mine owners and miners not to weigh the last car of coal mined each day because that coal was used in the locomotive, the weight being fixed at the average carload weight for the day. The court declared invalid a statute requiring all mine owners, where miners were paid by weight, to weigh *all* cars at the mine, saying:

> "This act makes it an offense against the law for any employer and laborer, at any coal mine at which the miners are paid by weight, to determine upon the weight of any miner's car, or any lot of coal, by any other method than that pointed out by the statute. A failure to weigh a car, and to keep a correct record of the weight, renders the operator liable to the penalties prescribed by the act, although he and the laborer may have agreed upon the weight of the car, or contracted for other methods of determining the weight. This is well illustrated by the facts of this case. The last car that came

> up in the evening of each day, designed for coaling the locomotives, would not be weighed until the coal was dumped into the tenders, so that the miners could not obtain the weights until the next day, and they wanted them the same evening. For this reason, and at the instance of the miners, it had been the custom for six years to give each miner the weight according to the system above stated. When the company attempted to change this system and weigh the coal, the miners objected, and insisted upon the custom of averaging weights. No objection was ever made by any miner to this manner of arriving at the weight, instead of weighing the cars on the scales. Here was an arrangement, amounting to a contract between the parties, with which all the contracting parties were satisfied, and the testimony upon which plaintiffs in error were convicted came from miners who left during the miners' strike of 1894, and were not again employed by the company. It seems that a law which deprives men engaged in the business of mining from contracting with each other for the purpose of ascertaining the weight of the coal mined, or the amount due them, in any manner mutually satisfactory, cannot be sustained. That such is the effect of this law is the contention of counsel for the people, and it is only upon the assumption that the law does so control the power to contract, that a conviction could have been had in this case; for, as already seen, the parties had contracted otherwise. This act takes away the freedom of contracting by the parties for the ascertainment of the weight of coal, except by a certain method; and in our opinion, it is unconstitutional."

So much has been written in the cases hereinbefore cited upon this subject, that little can be added thereto. Laws similar in principle have been before the courts and have been almost unanimously condemned, in opinions each of which is a forceful argument in favor of the contention here made. Thus, upon the ground of unreasonable interference with the liberty of contract, the courts have condemned legislative acts prescribing maximum hours of labor (*Lochner* v. *New York,* 198 U. S., 45, 49 L. Ed., 937); making unlawful, contracts of employment forbidding membership in labor unions (*State* v. *Julow,* 129 Mo., 163; *People* v. *Marcus,* 189 N. Y., 257; 77 N. E., 1073; *Gillespie* v. *People*, 188 Ill., 176, 58 N. E., 1007; *Coffeyville B. & T. Co.* v.

Perry, 69 Kans., 297, 76 Pac., 848; *State* v. *Bateman*, 7 Ohio N. P., 487; *Ex rel. Zillmer* v. *Kreutzberg*, 114 Wis., 530, 90 S. W., 1098; *Goldfield Mines Co.* v. *Miners' Union*, 159 Fed., 500); requiring stipulations in contracts for public work that none but union labor be employed (*Atlanta* v. *Stein*, 111 Ga., 789, 36 S. E., 932, 51 L. R. A., 335; *Marshall, etc., Co.* v. *Nashville*, 109 Tenn., 495, 71 S. W., 815; *Adams* v. *Brennan*, 177 Ill., 194, 52 N. E., 314, 42 L. R. A., 718; *Holden* v. *Alton*, 179 Ill., 318, 53 N. E., 556;*Fiske* v. *People*, 188 Ill., 206, 58 N. E., 985, 52 L. R. A., 291; *State ex rel. Furniture Co.* v. *Toole*, 26 Mont., 22, 66 Pac., 496; 55 L. R. A., 644; *Lewis* v. *Board of Education*, 139 Mich., 306, 102 N. W., 756; *People ex rel. Rodgers* v. *Coler*, 166 N. Y., 1, 59 N. E., 716, 52 L. R. A., 814); making it criminal to discharge an employe because he is a member of a labor organization (*Adair* v. *U. S.*, 208 U. S., 161, 52 L. Ed., 436); requiring contractors to pay certain minimum wages (*Street* v. *Electrical Supply Co.*, 160 Ind., 338, 66 N. E., 895; *State* v. *Norton*, 5 Ohio N. P., 183); regulating the time of payment of wages in defiance of contract (*Leep* v. *Ry. Co.*, 58 Ark., 407, 427, 25 S. W., 75, 20 L. R. A., 264; *Braceville Coal Co.* v. *People*, 147 Ill., 66, 45 N. E., 62, 22 L. R. A., 340; *Railway Co.* v. *Wilson*, (Tex.), 19 S. W., 910; *Republic I. & S. Co.* v. *State*, 160 Ind., 379, 66 N. E., 1005; *Commonwealth* v. *Isenburg*, 4 Pa. Dist. R., 579; *Bauer* v. *Reynolds*, 3 Pa. Dist. R., 502); prohibiting payment of laborers otherwise than in money (*State* v. *Loomis*, 115 Mo., 307; *State* v. *Goodwill*, 33 W. Va., 179, 10 S. E. 285; *Godcharles* v. *Wigeman*, 113 Pa., 431, 6 Atl., 354; *State* v. *Hann*, 61 Kan., 146, 59 Pac., 340; *Jordan* v. *State*, 51 Tex. Crim., 531, 103 S. W., 633; *Avent Coal Co.* v. *Commonwealth*, 96 Ky., 218, 28 S. W., 502); prohibiting mine owners from dealing in supplies, provisions, etc. (*Froer* v. *People*, 141 Ill., 171, 31 N. E., 395); forbidding sale of supplies to employes at greater price than to others (*State* v. *Fire Creek C. & C. Co.*, 33 W. Va., 118, 10 S. E., 288); forbidding deduction of wages because of defective work (*Com.* v. *Perry*, 155 Mass., 117, 28 N. E., 1126), or for any reason except for actual cash advanced (*Kellyville Coal Co.* v. *Harrier,* 207 Ill., 624, 69 N. E., 927); requiring employers to give discharged employes written reasons for discharge (*Wallace* v. *Ry. Co.,* 94 Ga., 732, 22 S. E., 579; *New York, etc., Ry. Co.* v. *Schaffer,* 65 Ohio, 414, 62 N. E., 1036); requiring a day's labor to consist of eight hours (*Low* v. *Rees Printing Co.,* 41 Neb., 127, 59 N. W., 362); requring sleeping car companies, upon request of occupant of lower berth, to raise upper berth if not occupied (*State* v. *Redmon,* 134 Wis., 89, 110, 114 N. W., 137); requiring all contractors for erection of buildings to give bond for benefit of material men (*Montague & Co.* v. *Furness,* 145 Cal., 205, 78 Pac., 640); forbidding cigar making in tenement houses (*In re Jacobs,* 98 N. Y., 98); regulating weight of loaves of bread (*City of Buffalo* v. *Collins Baking Co.,* 39 App. Div., [N. Y.], 432, 57 N. Y. Supp., 347); giving state board power to refuse or grant nurseryman's license as it might think applicant "financially responsible" or not (*State ex rel. Hawley* v. *Nelson,* [S. D.], 115 N. W., 93); requiring certain bonds to be secured by surety companies as sureties (*State ex rel. McKell* v. *Robins,* 71 Ohio, 273, 73 N. E., 470); prohibiting location of laundry without consent of certain property owners (*Ex parte Sing Lee,* 96 Cal., 354, 31 Pac., 245; Laundry Ordinance case, 13 Fed., 229) or unless permitted by board of supervisors (*Yick Wo* v. *Hopkins,* 118 U. S., 373 30 L. Ed., 220); requiring production of certificate showing payment of all taxes due before recording conveyance of real estate (*State ex rel. Baldwin* v. *Moore,* 7 Wash., 173, 34 Pac., 461); forbidding sale of groceries and provisions in same store where dry goods, clothing or drugs are sold (*City of Chicago* v. *Nitcher,* 183 Ill., 104, 55 N. E., 707); making gift of premium stamps with purchase a crime (*People ex rel. Appel* v. *Zimmermann,* 102 App. N. Y., 103, 92 N. Y., Supp., 497; *Madden* v. *Dycker,* 72 App. Div. N. Y., 308, 76 N. Y. Supp., 111); prohibiting selling of any article upon inducement of a premium (*People* v. *Gilhson,* 109

N. Y., 397, 17 N. E., 343); requiring mine owners to provide scales for weighing coal and to make the weight of coal the basis of wages (*Millett* v. *People,* 117 Ill., 294, 7 N. E., 631; *In Re House Bill No.* 203, 21 Col., 27, 39 Pac., 431); requiring payment for coal mined to be based on coal before screened (*Ramsey* v. *People,* 142 Ill., 380, 32 N. E., 364; *Re Preston,* 63 O. St., 428, 59 N. E., 101, 52 L. R. A., 523; *Whitebreast Fuel Co.* v. *People,* 175 Ill., 51, 51 N. E., 853); making it criminal to offer real estate for sale without written authority (*Fisher Co.* v. *Woods,* 187 N. Y., 90, 79 N. E., 836); putting onerous restrictions upon keeping of private asylums for insane (*Ex parte Whitwell,* 98 Cal., 73, 32 Pac., 870, 19 L. R. A., 727).

(d) Turning to the facts we have this case: Both buyer and seller were members of the Kansas City Board of Trade, a voluntary association. This membership was by a *written* contract signed by each member. This contract provided for a trading room for the *exclusive* use of the members, parties to the contract, and that upon all sales of grain *between* themselves, one hundred pounds should be deducted from each car load, and that in all trades there made, regardless of the ownership of the grain, the buyer and seller should, as between themselves, contract as the *sole* principals. While the provision for a deduction was *called* a rule, it was in fact a part of the written contract, of exactly the force and effect it would have had if it had been designated a paragraph thereof. The rule, or paragraph of this contract, was framed with the best motives. It was intended to offset section sixteen of the contract (Rec., 8), which required that cars be weighed before unloading at Kansas City and after weighing be cleanly swept, thus requiring the entire contents to be weighed and treated as grain. Kansas City is a primary market in the heart of the grain raising district of the country. Hence great quantities of grain are there delivered direct from the fields. Such grain has mixed with it dirt and foreign substances, for which no seller can be compelled to pay. Much grain is also loaded at country stations into cars which have not been cleaned of the substances theretofore hauled therein.

There is no method of ascertaining exactly how much of the contents of a car will consist of this dirt and these substances. The delay, expense and difficulty of exact ascertainment would delay, if not prevent business deals. One hundred pounds had by experience been found to be a fair average. This is an insignificant amount when the capacity of a grain car is 80,000 to 90,000 pounds, the average car load of wheat 72,000, and of corn 67,200 pounds. Buyers and seller agreed to this deduction as the fair thing, and made the contract accordingly.

II.

Majority opinion considered.

(a) Judge Gantt (Rec., 50) said the case did not involve the right of one to make a contract, but the question was as to the right of plaintiff, as a buyer of grain, to deduct an amount from actual weight *only by virtue of a rule of a Board of Trade.* This is an erroneous view. Both parties made the contract *understanding* that the deduction was to be made. Upon the seller's written account of the sale (necessarily made by him) the deduction was noted, and in accordance therewith the buyer settled. The deduction was not therefore claimed "*only* by virtue of a rule," moreover the rule itself, was but a paragraph of a written contract between the buyer and seller. The deduction was therefore not arbitrary, but was something to which both parties agreed.

(b) It was next asserted that the deduction was made without the real owner of the grain being apprised thereof. This is outside of the agreed facts. The two parties contracted as between themselves, the buyer not knowing that the seller did not actually own the grain. It is immaterial what the arrangement was between the real owner and the commission man selling for him. The buyer made a contract with one as owner in good faith upon reasonable ground contracting for a fair deduction in weight.

(c) It was next said that there was some kind of fraud to be circumvented, and to make the deduction was an unfair thing; hence the necessity for the act as a police regulation. There was not a chance for fraud. There was neither concealment nor deceit. The entire weight of the contents of the car and the amount of the deduction were shown on the written account of sales upon which the parties settled. Both understood that it was to be made. Both had signed the contract creating the Board of Trade, authorizing the deduction in all trades between themselves. There was nothing unfair in making it. The rule or contract therefor was the result of what both buyers and sellers in a great market had determined to be a just rule to govern their sales in that market. It was enacted by them "to secure the buyer from loss through dirt and foreign matter in or swept out with the grain which was unloaded at Kansas City," and "the one hundred pound quantity was taken as a fair average" of the "loss from dirt and foreign matter, varying with different cars, which is not fully taken care of in the grade," because "there is no method in use of accurately determining the percentage of such foreign matter and dirt." If the deduction can neither be made nor contracted for, then the seller will be paid for more than he sells. If the dirt and foreign substances can be separated, it facilitates commerce to agree upon the amount of the deduction rather than suffer the delays incident to separation thereof.

(d) Both Judge Gantt and Judge Woodson seemingly failed to appreciate the character of business done by a Board of Trade and the advantages to the public from its existence. Each treats the situation as if the organization were a corporation of dangerous character, *forcing* upon its members and the public against their will an unreasonable and arbitrary by-law passed by it. The real vice of their opinions is in the absolute failure to understand the nature of the organization and the difference between a voluntary association and a corporation. To this subject some attention will next be given.

III.

The Board of Trade was a voluntary association of great service to the public and the alleged rule was but a reasonable provision in a written contract between plaintiff in error and others.

(a) *The nature of an organization like the Board of Trade.*

A Board of Trade is organized by the voluntary action of brokers for the purpose of making an arrangement, enforcible as between themselves, of an honorable character to create a high standard of business dealings.

Lord O'Hagan, in *Tompkins* v. *Saffrey*, L. R., 3 App. Cas., 213, 228, speaking of the London Stock Exchange, with rules similar to those of the Board of Trade, said:

> "I feel bound to say that I see nothing in the case which impeaches the integrity, in purpose or action, of the Stock Exchange. * * * I think there is no ground whatever for * * * an imputation of impropriety, either as to the rules of the body or the proceedings of its members."

In the same case, on page 232, Lord Blackburn said that by becoming a member of the Stock Exchange the party did not enter into "an agreement enforcible in law, but an honorary agreement that he would act in his dealings upon the Stock Exchange according to its rules, as long as he continued to be a member." And in the same case, Lord Gordon said, on page 238:

> "It is a great matter that there should be a code drawn up, not, of course, binding upon the public, but for the pur-

> pose of regulating their rights *inter se* and with a view to promote equality in cases of difference amongst themselves."

The Kansas City Court of Appeals (*Moffatt* v. *Kansas City Board of Trade*, 111 S. W. Rep., 894, 900), of the Kansas City Board of Trade said:

> "A voluntary organization of men engaged in the same business, formed not for the purpose of profit to the body as a whole, but to provide a convenient market place where the members may meet and transact business with each other, under rules and regulations prescribed in their regularly adopted constitution and by-laws, is regarded by the courts, not only as a valuable and efficient aid to commerce, but as a potent agency for elevating the standard of business ethics and honor. Such beneficent aims deserve approbation, and courts of equity, recognizing their worth, have abstained from subjecting such associations to visitation or correction when their declared objects and practices are kept in harmony with the spirit of the general law. It matters not whether the rules of individual conduct imposed, or those relating to the admission or expulsion of members, appear to be reasonable or unreasonable, as long as they are not immoral or hostile to the policy of the law, courts will not interfere. No one is compelled to join. Members go in voluntarily, and, doing so, a member has no right to complain to the courts of what he may consider an unnecessarily harsh rule or severe penalty, but which the majority of the members in adopting have decided is in the interest of the body. If he does not wish to abide by the rules regularly enacted by the association, he should refrain from joining, or, if already a member, should withdraw. Remaining a member, it is his duty to obey the laws of the organization or suffer the consequences."

This court in no uncertain terms took a like view of a live stock exchange (*Hopkins* v. *U. S.*, 171 U. S., 578, 597, 43 L. Ed., 290, 297, Mr. Justice Peckham saying:

> "The facilities or privileges offered by the defendants are apparent and valuable. The cattle owner has the use of a place for his cattle furnished by the defendants and all the facilities arising from a market where the sales and purchases are conducted under the auspices of the association of which the defendants are members, and in a manner the least troublesome to the owners and at the same time the most expeditious and effective."

In *Nicol* v. *Ames*, 173 U. S., 509, 517, 43 L. Ed., 786, 792, Mr. Justice Peckham said:

> "It is common knowledge that these exchanges encourage and promote honest and fair dealing among their members."

Judge Philips expressed similar views in *Greer* v. *Stoller*, 77 Fed. Rep., 1.

In The Law and Customs of The Stock Exchange, by Melsheimer and Gardner (3rd Ed. London, 1891), 98, this language is used:

> "The inviolability of bargains is the foundation stone of the whole exchange system. * * * The members have bound themselves together by a code of honor based on the inviolability of bargains, and the maintenance of this standard has always been regarded as the principal function of the committee."

In *Clark* v. *Foss*, 7 Biss., 547, 555, it was stated that the typical exchange—

> "Undertakes to exercise a salutary control over its members, * * * and scalpers (persons undertaking to deal otherwise than in conformity to its rules) cannot live in that atmosphere; they bearing the same relation to that fraternity of commercial gentlemen that shysters do to full-bred lawyers."

In Bisbee and Simon's Exchanges, Preface VI, it is said:

> "In its present form, the exchange is a legitimate outcome of modern commerce, the necessity for which could be fully realized only in its absence."

The fact that a membership fee is charged, makes no difference as to the rights of the parties. The association owns no property, there is a mere membership, the fee being paid as an aid to carry the expense of the organization. The very definition of an exchange excludes the idea of having property interests.

Thus in *White* v. *Brownell*, 2 Daly, 329, 336, 355, 356, an exchange was defined to be:

> "An association of persons engaged in the same kind of business, who have organized together for the purpose of establishing certain rules, by which each agrees to be governed in the conduct and management of his separate transactions or business. * * * Each purchase and sale is not for the joint benefit of the body, but is, as it would be in any other place, an individual transaction between the parties making it."

In *Leech* v. *Harris*, 2 Brewst. (Pa.), 571, 575, 576, it was said:

> "The Board of Brokers is a voluntary association of persons who, for the convenience in the transaction of business with each other, have associated themselves to provide a common place for the transaction of their individual business, agreeing among themselves to pay the expenses incident to the support of the objects of the association, in which each for himself at stated hours of the day, and for his individual profit, may prosecute his own business and enter into separate engagements with his fellow members. The association does not share in the losses of the individual associates; and each member takes his own gains and individually sustains the losses incident to his engagements."

Similar definitions have been given *In Re Haebler*, 149 N. Y., 414, 428, and *American Com. Co.* v. *Chicago Live Stock Exchange*, 143 Ill., 210, 226.

In Dos Passos on Stock Exchange, 15, it is said:

> "The organization of the board grew out of a necessity for new and greater facilities for exchange and negotiations incident to the rapidly developing industries of the country, and the increasing number and value of its commercial securities. * * * A voluntary association of persons by which each individual broker is enabled to carry on his separate business, under regulations made alike for the protection of himself and his client or principal."

In 23 Am. & Eng. Ency. of Law, pp. 749, 750, 751, an exchange is defined to be:

> "A voluntary business association formed by its members, for the purpose of buying and selling amongst each

> other, either as principals in their transactions or as agents acting for parties who are not members of the body, and having a code of laws regulating the admission, conduct, suspension and expulsion of members. * * * It is a comparatively modern institution, and has been developed step by step in response to the demands of business necessity."

In *Seymour* v. *Bridge*, 14 Q. B. Div., 460, 465, it was said that the rule that none but members will be recognized by the exchange "is so binding that the consequences to the brokers" (of a violation) "would be their expulsion from the exchange as defaulters, or their being made liable by a summary order of the committee, in case they did not fulfill the contract they had entered into."

In *White* v. *Brownell*, 2 Daly, 329, it was said:

> "The very existence of this body depends upon the faithful observance of its organic law by all of its members."

In *Belton* v. *Hatch*, 109 N. Y., 593, 596, 598, the New York Stock Exchange was likened to a "Business Club," the court saying:

> "Its principal object is the promotion of the convenience of its members by furnishing facilities which aid them in doing their business and are, therefore, of benefit to them."

And of the same exchange, in *Commercial Telegraph Co.* v. *Smith*, 47 Hun., 494, 505, it was said:

> "It is just as much a master of its own business and of the methods of conducting the same, as any private individual within the state."

In *Board of Trade* v. *Nelson*, 162 Ill., 431, 438, an expulsion was upheld for failure to perform a contract, the court saying:

> "The right to pursue a business as a member of such an organization in the hall of the building devoted to that purpose may be a thing of value; but its value is incidental to membership, and a determination of such membership destroys the rights under it. This corporation is not bound to

> admit any person to membership, nor was the relator in any way forced into such association. He voluntarily became a member, and by his contract is bound to abide by the rules and regulations of the board. The courts will never interfere to control the enforcement of by-laws of such associations; but they will be left to enforce their rules and regulations by such means as they may adopt for their government."

And in *People* v. *New York Commercial Association*, 18 Abb. Pr., 271, 279, 280, in speaking of fraudulent and dishonest conduct, the court said:

> "It was not an individual matter for the member to violate this agreement, but affected the standing and character of the entire association."

In *Vaughn* v. *Herndon*, 91 Tenn., 64, the rules of the Clarksville Tobacco Board of Trade, requiring the members as between themselves, and so far as concerned their relations to the board, to arbitrate their differences, were said to be "wise legislation, that will operate to prevent much needless and expensive litigation, as well as promote the welfare of commerce, if correctly enforced."

In *Evans* v. *Chamber of Commerce*, 86 Minn., 448, 91 N. W., 8, 11, a similar provision was under consideration. After citing numerous authorities, the court said:

> "The conclusion to be deduced from the authorities quoted from and cited is that it is a general rule of law, applicable to such voluntary associations that a member must either submit to its rules or surrender his membership. It is optional with him to retain his membership by complying with the by-laws or to surrender it and cease to be a member by refusing to comply. The interest of each member in the organization is subject to its constitution and the by-laws, which express and regulate the contract by which he has consented to be bound, and they are conclusive upon him in respect to the mode of transacting his business and of his right to continue to be a member."

In *People* v. *Chicago Board of Trade*, 80 Ill., 134, 136, it was said:

> "This organization is not maintained for the transaction of business or for pecuniary gain. * * * It is not en-

> gaged in business, but only prescribes rules for the transaction of business."

In *Metropolitan Grain and Stock Exchange* v. *Board of Trade*, 15 Fed. Rep., 847, it was said of a similar association:

> "It is only an association of merchants dealing in the products of the country, who, solely for their own convenience, provide a room where they meet to transact business. They have a right to exclude all other persons from the meetings of the board, or to admit only such as they choose."

(b) *There is a vast difference between the rights of a member of a voluntary, unincorporated institution, and those of a shareholder of a corporation.*

In 1 Thompson on Corporations, Sec. 846, it is said:

> "Another distinction which must be kept in mind in respect of this question, is the distinction between rights in a *corporation* and rights in an *unincorporated society.* In the former case, the member has rights granted by the legislature which cannot be taken away by the society unless authorized by the governing statute or charter, or unless, under the principles of the common law, in the extreme cases hereafter spoken of. But in the latter case, the member has no rights of a higher dignity than those springing out of a voluntary contract between himself and his fellow members."

The distinction is also announced in Bacon on Benefit Societies, Sec. 89, as follows:

> "If no property right be involved, a distinction is made in respect to by-laws and regulations, between incorporated societies and those which are voluntary associations. In the former the by-laws must be reasonable, but in the latter the members are bound by their duly adopted by-laws and regulations, whether they be reasonable or not, provided, however, they are not in conflict with the law of the land or public policy, and the courts will only examine whether they have been adopted in the way agreed on by the members."

In Niblack on Benefit Societies, Sec. 30, it is said:

> "Unincorporated voluntary societies come into existence by the mutual agreement of the persons forming it, and privil-

ege of membership is not given by statute, or derived through prescription, but is created and conferred by the organization itself. The law cannot compel such a society to admit an individual to membership and a person who has applied for admission and been excluded is utterly without remedy at law, however arbitrary and unjust he may regard the exclusion. Such societies may prescribe the conditions upon which persons may be admitted to membership, and they are the exclusive judges as to the existence of such conditions. The right of admission to membership is voluntary and mutual between the society and individuals desiring to become members. No one can be compelled to join the society, or to remain a member against his wish, nor can the society be compelled to admit a person against its will. This principle is inherent in every voluntary society."

In Niblack on Benefit Societies, Sec. 22, it is said:

"In respect to the by-laws of an unincorporated society, the court has no visitorial power, and may not determine whether they are reasonable or unreasonable. The court regards the members of such societies as standing, to some extent at least, in the relation of partners, and permits them to make their own compacts so long as they are legal. When a by-law of such a society is legal the only question which a court may examine is, whether it has been adopted in the way agreed upon by the members in their contract of association. If a member of such a society deems its by-laws unreasonable and oppressive, his only remedy is to withdraw from membership in it. This theory of an unincorporated society is that men shall come together of their own free will and accord, and be bound by such legal rules as shall be passed in the manner agreed upon. There are cases in the books where the by-laws of an unincorporated society have been declared to be just and reasonable, but there are none, it is believed, where the by-laws of such a society have been held to be unreasonable and void."

But as to incorporated bodies it is different, Niblack, Sec. 23, saying:

"But it is a governing rule with regard to corporations, that their by-laws must be reasonable, and all which are vexatious, unequal, oppressive or manifestly detrimental to the interests of the corporation are void."

In Sec. 73, Niblack says:

"When a person becomes a member he bases his rights as such, not upon any character which guarantees to him a certain protection under the laws of the land, but upon the will of a majority of his fellow-members, under the contract of association. The policy and acts of such a society are necessarily controlled by a majority of its members, and the constitution and by-laws agreed upon contain the contract of association, and form the laws which govern the majority and each member of the society. It is not the province of a court to make contracts for parties, and it may not make any other contract for the members than that which is set forth in the constitution and by-laws. The court has no visitorial power over unincorporated societies, since they exist, not by grant from the state, but by the agreement of the members; and when the parties have agreed upon the terms under which membership shall continue the court will not inquire into the reasonableness or unreasonableness of such terms. There are *obiter dicta* in some cases, and one decision to the effect that courts will not inquire into the reasonableness of by-laws of voluntary societies, even though they be incorporated, if it be shown that the member assented to them. There are numerous *obiter dicta* in the books to the effect that courts will not interfere with the rules and by-laws of unincorporated voluntary societies, *unless they are manifestly harsh and unconscionable;* but it is believed that there is not a case in which a court has ever declared a by-law of such a society to be unreasonable and, on that account, invalid. The true rule is that the by-laws of an incorporated society must be reasonable and necessary for its good improvement, as well as in conformity with the laws of the land, and the assent of the members to the by-laws is not to be considered as determining their validity; but individuals who form themselves into an unincorporated voluntary society for a common object may and do agree that so long as they retain their relations with the society, they shall be governed by the constitution and by-laws as they exist, and as they may be amended under the contract of association, if there is nothing in them or in such amendments in conflict with the law of the land; and those who become members of the society are presumed to know them, to have assented to them, and are bound by them. While a society remains unincorporated, therefore, it may make regulations *ad libitum* for the discipline of its members, including, of course, expulsion, so long as they are not in conflict with the law. But the moment it obtains a charter, it

> parts with the powers it before possessed, and comes under the law which governs corporate bodies."

In *Kehenbeck* v. *Logeman*, 10 Daly, (N. Y.), 447, the court said:

> "It has been held in this court upon more than one occasion that in respect to the by-laws of a voluntary association the court has no visitorial power, and cannot determine whether they are reasonable or unreasonable, and the only question which it can examine is whether they have been adopted in the way which has been agreed upon by the members of the association. * * * The association being a voluntary one, as has been stated above, this court has no power to pass upon the question as to whether such rules and regulations as they choose to adopt for the guidance of their own affairs are reasonable or unreasonable."

IV.

Judge Burgess had no right to cast the deciding vote below.

(a) A stipulation has been filed reciting:

> "To avoid suggestion of diminution of record and *certiorari* to complete same, it is agreed that the record may be treated as amended so as to show that Judge Burgess, one of the judges of the Supreme Court of Missouri, was not present at, and did not hear the oral argument below, but that he had received the printed briefs and arguments of both plaintiff and defendant at the time of oral argument, the clerk delivering same to him under the practice of the court without notice to either party."

(b) The vote of Judge Burgess made the majority constitutionally necessary to render the judgment; otherwise a special judge should have been called in, because the Missouri constitution (Article 6, Sec. 11) provides:

> "If, in any cause pending in the Supreme Court, or the St. Louis Court of Appeals, the judges sitting shall be equally

> divided in opinion, no judgment shall be entered therein based on such division; but the parties to the cause may agree upon some person, learned in the law, to act as special judge in the cause, who shall therein sit with the court and give decision in the same manner and with the same effect as one of the judges. If the parties cannot agree upon a special judge, the court shall appoint one."

In original proceedings counsel cannot be denied the right of an oral argument nor a cause be decided by judges who did not hear it. As Chief Justice Horton (*C. K. & W. R. Co.* v. *Abilene*, 42 Kan., 97, 21 Pac. Rep., 1117, 1118) said:

> "If this were an original proceeding in this court in *quo warranto, mandamus* or *habeas corpus*, I think the decisions already rendered are conclusive that oral argument cannot be denied to either party before judgment. In such cases this court is a trier of facts as well as of law. * * * Although this is a proceeding in error, and not an original case, I do not think this court, considering the practice in existence at the formation and adoption of the constitution, has the power to deny to any party the right to orally present his case by attorney to this court, when the cause is regularly called for hearing. The court, however, within reasonable rules may limit the time of oral arguments, and also require written briefs and abstracts. Oral argument, in reasonable bounds, is helpful and beneficial to the court, and therefore its denial is both injurious to suitors and the court. In my own case, as a general thing, I am much better qualified to decide a case which is submitted to me upon oral argument than upon briefs and abstracts only. A court, pushed and pressed with business as our court is, ought to have all the help, assistance, and benefit that oral arguments can give. At least, I wish it, if the attorneys are willing to furnish it. If the court had the power to deny to suitors the privilege of having their cases argued orally when called for hearing, I would not favor its exercise, as it does not give satisfaction to the profession, or to the parties having cases to be decided. When I was in the active practice, I preferred to argue my jury cases before the jury returned their verdict. I also preferred to argue my law cases to the court before the judgment was rendered against my client. I judge others by myself."

In *Bullock* v. *McGeer*, 14 Col., 577, 23 Pac. Rep., 980, 983, 984, Judge Elliott said:

> "It is proper, therefore, to state that this court is now, and always has been, of the opinion that it cannot discharge its constitutional obligations to litigants by the promulgation of any opinion, by whomsoever prepared, without first being satisfied of the correctness of the opinion in all substantial particulars; and also that the privilege of being heard orally before the court prior to final judgment is a right which, though subject to reasonable regulation by the court, cannot justly be denied to any party litigant making seasonable application therefor. 'Hear before you strike,' was a maxim of the ancient jurists. Whenever it is necessary that an oral argument should be had in order to a correct understanding and determination of a cause, such necessity is not satisfied by allowing such hearing before the commission; the effect of such oral argument cannot be fully appreciated by the court except the argument be made to the court."

If one has the right to an oral argument before the court, he is entitled to it before every judge who participates in the decision. No judge who has not heard it, can afterwards vote upon the case, making a majority where one did not before exist. This privilege is something of which a suitor should not be deprived, especially where, as here, there were four opinions—an equal division of the judges who heard the oral arguments. As in *State* v. *Collins*, 70 N. C., 241, the court said:

> " 'Next to doing right, the great object in the administration of public justice should be to give public satisfaction.' When Sir Walter Raleigh was put on his trial for treason, the judges attempted to stop him in his defense, but he had the manhood to assert his rights. 'My lords,' said he, 'I stand for my life.' Posterity has vindicated him, and condemned his judges."

(c) The protection of the fourteenth amendment was therefore denied petitioner, in that due process of law was not accorded because a judge who did not hear the oral argument actually determined the case. The right denied was a substantial one.

There was not, therefore, an "*opportunity* to be heard" (*Twining* v. *New Jersey*, 211 U. S., 78, 111, 53 L. Ed., 97, 111). It was not an instance where the method of procedure accorded "*fair* opportunity to be heard before the issues are decided." (*Iowa C. R. Co.* v. *Iowa*, 160 U. S., 389, 393, 40 L. Ed., 467, 469), or where "*adequate* opportunity has been afforded him to defend" (*L. & N. R. Co.* v. *Schmidt*, 177 U. S., 236, 44 L. Ed., 750), or where there was "a *fair* opportunity to be heard" (*Hooker* v. *Los Angeles*, 188 U. S., 314, 318, 47 L. Ed., 487, 491), or "an *adequate* opportunity to defend himself in the prosecution" (*Rogers* v. *Peck*, 199 U. S., 425, 435, 50 L. Ed., 256).

Respectfully submitted.

KIMBROUGH STONE,
FRANK HAGERMAN,
Attorneys for Plaintiff in Error.

DEC [illegible] 1910
JAMES H. McKENNEY, Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. [illegible].

R. J. Hogan, *Plaintiff in Error,*

vs.

John B. [illegible], Marshal of Jackson County, Missouri, and Elliott W. Major, Attorney-General, *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

DEFENDANT'S STATEMENT, BRIEF AND ARGUMENT.

ELLIOTT W. MAJOR,
Attorney-General of Missouri,
JOHN M. ATKINSON,
Assistant Attorney-General of Missouri,
Attorneys and Counsellors for Defendant in Error.

[[illegible]]

[illegible]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 597.

R. J. House, *Plaintiff in Error,*
vs.
Joel B. Mayes, Marshal of Jackson County, Missouri, and Elliott W. Major, Attorney-General, *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

DEFENDANTS' STATEMENT, BRIEF AND ARGUMENT.

STATEMENT.

This is a writ of error to review the action of the Supreme Court of Missouri (ex parte, House vs. Mays, 227 Mo. p. 617), in refusing upon the application for a writ of habeas corpus to discharge plaintiff in error from the information in this case and in remanding him to the marshal of Jackson County in order that prosecution may proceed according to law.

On September 21, 1909, the prosecuting attorney for Jackson County, Missouri, filed in the criminal court of said county an information in due form, charging R. J. House, plaintiff in error, with the violation of an act passed by the Missouri Legislature in 1909, entitled "**An act to prevent fraud in the purchase and sale of grain and other commodities**" (said act is set out in full in the appendix to this brief), and which said information, omitting formal parts, is as follows:

INFORMATION.

"Now comes Virgil Conkling, prosecuting attorney for the State of Missouri, in and for the body of the county of Jackson, and upon his oath informs the court, that R. J. House, whose Christian name in full is unknown to said prosecuting attorney, late of the county aforesaid, on the first day of September, 1909, at the county of Jackson, State of Missouri, did purchase, from one James Anderson, one car load of wheat, by weight, and did then and there willfully and unlawfully from the actual weight of the said wheat, so by him purchased, take and deduct one hundred pounds; he the said R. J. House pretending and claiming to have the right to make such deduction, and to have and keep the said one hundred pounds of wheat so deducted free of charge and cost to him, under and by virtue of a rule and custom of the Board of Trade of Kansas City, Missouri, contrary to the form of the statute in such cases made and provided; and against the peace and dignity of the State." (Rec. pp. 5-6.)

Thereupon the clerk of said court issued a **capias** to Joel B. Mayes, the marshal of said county, and plaintiff in error was thereafter duly arrested by said officer.

On September 23 thereafter, plaintiff in error applied to the Supreme Court of Missouri, by petition, for his release by writ of **habeas corpus**.

The material allegations contained in said petition are as follows:

PETITION.

"Your petitioner says that said imprisonment is illegal in this, to wit: that said arrest was made and your petitioner is confined solely because of an alleged violation of an act of the legislature, approved June 8th, 1909, entitled "An act to prevent fraud in the purchase and sale of grain and other commodities" (Laws of Missouri, 1909, p. 519). It being alleged that your petitioner, under claim of right to do so by reason of a rule of the Board of Trade of Kansas City, Missouri, did deduct one hundred (100) pounds from the returned weight of a car load of grain purchased by him upon the trading floor of said Board of Trade. That your petitioner respectfully says that said law is invalid and of no force, and constitutes no justification or basis for his arrest and confinement, being in violation of sections 4 and 30, article II, in that it interferes with his liberty and right of contract and his right to enjoy the gains of his own industry, and section 53, article IV (prohibiting special laws regulating trade) of the Constitution of the State, and of the Fourteenth Amendment to the Constitution of the United States, in that it deprives him of liberty and property without due process of law and interferes with his right of contract.'' (Rec. pp. 2-3.)

Upon the filing of said petition by plaintiff in error, the chief justice of said court issued the writ as prayed, returnable October 12, 1909, and return was duly made on said date. The Marshal justified his arrest and detention of plaintiff in error for a violation of said act as charged in said information. (Rec. p. 5.)

This cause was thereafter argued and submitted to said court in banc upon the following agreed statement of facts:

AGREED STATEMENT OF FACTS.

''Without admission of either party as to the relevancy of any particular fact herein set forth, the following facts are agreed between the parties:

There are competitive grain markets at Galveston, Texas; Chicago, Illinois; Omaha, Nebraska; Atchison and Wichita, Kansas; and St. Louis, St. Joseph and Kansas City. Missouri. That Kansas City is a primary grain market. That a very slight difference in price or condition will influence the market course of grain.

That the Board of Trade of Kansas City, Missouri, is a voluntary organization of buyers and sellers of grain and provisions, supported by dues and assessments and maintained for the purpose of furnishing a marketing place where such persons can meet and, under rules of safety and convenience, transact such business. Its objects are:

" 'To maintain a Board of Trade to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in business; to facilitate the speedy adjustment of business disputes; to inspire confidence in the business methods and integrity of the parties hereto; to collect and disseminate valuable commercial and economic information, and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits, and to promote the general welfare of Kansas City.'

Its members are governed by rules and regulations, enacted by the members, and which form part of the written contract of association between them.

This organization provides for the exclusive use of its members a trading floor, where grain is bought and sold only under and according to said rules. Three of said rules are:

" 'Sec. 16. The weight Supervising Committee shall have supervision, through the Weight Department, of the unloading of all cars unloaded at all elevators, mills, warehouses, transfer and team tracks, within the jurisdiction of this Board, and shall cause the same to be thoroughly swept and cleaned when unloaded. Sweeping or cleaning of cars subsequently by any operator or employe of any elevator, mill, warehouse, transfer or team tracks, or by any person or persons under agreement with the same; or the buying or receiving of any such sweepings or cleanings by any member of this Association is prohibited.

'Sec. 17. Violations of any of the provisions of Section 16 of this article shall subject the members so violating to a fine of $50.00 for the first offense, to a fine of $100.00 for the second offense, to expulsion and forfeiture of membership for the third offense.

'Sec. 18. On all grain bought by members of the Kansas City Board of Trade, and on which Kansas City unloading weights are given, an allowance of one hundred lbs. per car shall be made to the buyer, to cover loss on account of dirt and other foreign matter.'

That said board of trade maintains a bureau of weights, which strictly enforces rule 16.

That rules 16 and 17 were enacted to secure to the seller the full weight of the entire contents of the car and rule 18 to secure the buyer from loss through dirt and foreign matter in or swept out with the grain, which was unloaded at Kansas City. Before grain is sold it is graded. One of the considerations in grading is the dirt and foreign matter in the grain. Experience had shown that there is a loss from dirt and foreign matter, varying with different cars, which is not fully taken care of in the grade. That there is no method in use of accurately determining the percentage of such foreign matter and dirt, and the one hundred pound quantity was taken as a fair average.

The members of said Board of Trade buy and sell sometimes as commission men for outsiders and sometimes for their own account, and it is impossible to tell without inquiry whether a buyer or seller is acting for himself or for someone else. The buying and selling of grain on the floor of said Board of Trade is, as in all other markets, based upon the constantly and rapidly fluctuating market prices in that and the other principal grain markets. There is no time nor opportunity to ascertain the capacity (principal or agent) in which a member is acting when he buys or sells, and, if he be in reality acting as agent, no opportunity to investigate the financial standing of the real principal. Because of this condition and also to secure the prompt and faithful performance of all such contracts of sale, there is a rule of said Board of Trade forbidding the disclosure of outside principals and holding the member in all cases as the principal. There are also rules making a membership responsible for the faithful performance of such contracts.

That the State Railroad and Warehouse Commission has in force a rule requiring cars unloaded at Kansas City to be cleanly swept.

That the method of making the reduction is to weigh the loaded car; then after emptying and cleanly sweeping the car, to weigh the car; the difference in these two weights is entered on the account sales as the weight of the carload of grain, the deduction of one hundred pounds being also noted on that slip and settlement made for this balance. That is, the weight of the entire contents of the car is shown and also the one hundred pounds deduction on the face of the account sales given the seller.

That upon the first day of September, 1909, your petitioner bought upon the trading floor of said Board of Trade and from a member thereof a carload of wheat on Kansas City unloading weights. In accordance with the above method and under said rule 18, he deducted one hundred pounds and made settlement for the balance.

The member selling this grain did not own it, but was acting as a commission man. He, however, dealt with your petitioner as in his own right and your petitioner had no notice or knowledge that such seller was not the real owner of the grain. Nothing had been said between the member selling and his principal as to the allowance of the one hundred pounds.

Both your petitioner and the seller understood at the time of sale that it was made subject to this rule.

MAJORITY OPINIONS.

On March 30, 1910, said court by majority opinion denied the petition of plaintiff in error for his discharge, and ordered him remanded to the custody of defendant in error, House thereby sustaining the constitutionality of said act.

Judge Gantt wrote the majority opinion in which Burgess, Lamm and Woodson, JJ. concurred. Valliant, C. J., Fox and Graves, JJ., dissent. (Rec. pp. 46-55.)

Judge Woodson wrote a concurring opinion in which Burgess, Gantt and Lamm, JJ. concurred. (Rec. pp. 55-56.)

DISSENTING OPINIONS.

Judge Graves wrote a dissenting opinion in which Valliant, C. J., and Fox J., concurred. (Rec. pp. 56-66.)

Judge Fox, also, wrote a dissenting opinion in which Valliant, C. J., and Graves, J., concurred. (Rec. pp. 67-69.)

ASSIGNMENTS OF ERROR.

Plaintiff in error has made the following assignments of error:

"1. In holding to be valid and constitutional the act of the legislature of Missouri approved June 8, 1909, entitled "An act to prevent fraud in the purchase and sale of grain and other commodities."

2. In holding that said act did not interfere either with the petitioner's liberty, his right of contract, or his right to enjoy the gains of his industry, and did not deprive him of liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

3. In not holding that said act was an unreasonable exercise of the police power, and therefore violative of said Fourteenth Amendment.

4. In not holding that said act denied to the petitioner the equal protection of the law accorded to him by the said amendment." (Rec. p. 73.)

Elliott W. Major, Attorney-General, appears in the record as a defendant in error, but is not and has not been made a party to the suit at any time. For uniformity sake we make him such in this brief.

BRIEF AND ARGUMENT.

I.

THE SUPREME COURT OF MISSOURI HELD THAT THE STATUTE BEING CHALLENGED HAS BOTH A CIVIL AND A CRIMINAL SIDE. THAT PLAINTIFF IN ERROR IS PROSECUTED ON THE CRIMINAL SIDE FOR AN OFFENSE COMPLETE IN AND OF ITSELF UNDER THE STATUTE AND FALLING WITHIN THE TITLE TO THE ACT. THAT NEITHER THE VALIDITY OF THE CIVIL SIDE OF THE STATUTE NOR THE VALIDITY OF ANY CIVIL CONTRACT OR RIGHT TO CONTRACT AS TO THE SALE OR WEIGHT OF GRAIN ARE INVOLVED.

A.

In reviewing the decision of the Supreme Court of the State of Missouri in this case it is first necessary to ascertain the construction placed upon the statute involved by that Court. The Court, in its opinion, has construed the statute in the following language:

> "The petitioner insists that the above act of the Legislature is void and is an unauthorized invasion of his liberty as a citizen under the constitution of this State and the constitution of the United States, in that it arbitrarily interferes with his right to contract in an unnecessary and

unreasonable manner. It will be observed that the information charges an offense under the first section of the act of June 8th, 1909, in that the petitioner did deduct from the actual weight of a carload of wheat purchased by him on the first day of September, 1909, from James Anderson, one hundred pounds, under a claim of right to do so under and by virtue of a rule and custom of the Board of Trade of Kansas City, Missouri, contrary to the statute, and under Section 1 of this law this conduct is made a misdemeanor, and the invalidity of the statute is the sole defense to this prosecution.

"By the agreed statement of facts it is admitted that the petitioner bought a carload of wheat from Anderson, on Kansas City unloading weights, and under the said rule eighteen of the Kansas City Board of Trade deducted one hundred pounds and made settlement for the balance, and that Anderson did not own the grain himself, but was acting as a commission man. And that Anderson, the member selling the said carload, had never derived any authority from his principal, the owner of said carload of wheat, to make such allowance of one hundred pounds. It is, however, agreed that the petitioner dealt with Anderson in his own right, and had no knowledge that Anderson was not the real owner of the grain, but that he and Anderson understood the sale was made subject to rule eighteen. It further appears from the agreed statement of facts that there is a rule of the said Board of Trade forbidding the disclosures of outside principals and holding the member in all cases as a principal.

"Before proceeding further, it is essential to a clear apprehension of the issues involved in this case and to free it from extraneous discussion, that we first understand the nature of the law upon which the prosecution of petitioner is bottomed. The act is short and can be easily analyzed. Obviously the statute has a two-fold aspect, to wit: a civil and a criminal side. Thus in the first sentence of the first section it is declared: 'Every sale of grain, seed, hay or coal shall be made on the basis of the actual weight thereof.' A failure to comply with this provision is nowhere made penal, and it relates only to the *civil rights* of the parties to a sale or contract of sale.

"Allied to this civil feature of the act is the further provision in Section 2 of the act which provides: 'No agent or broker selling any grain, seed, hay or coal shall have authority *under claim of right to do so by reason of any custom or rule of Board of Trade*, to sell any grain, seed, hay or coal only on the basis of the actual weight thereof, and any contract of sale of any grain, seed, hay or coal made in violation of this act shall be null and void.' So that, brought into juxtaposition we have: First, simply a provision that all sales of grain shall be made on the basis of its actual weight; and then, that no broker or agent dealing in grain shall have any authority *by virtue of any custom or rule of Board of Trade to sell grain* consigned to him or for another, except upon the basis of its actual weight, and if he does, the contract shall be null and void. These are purely civil features of the law and they are in no sense penal.

"On the other hand, the statute has a distinct criminal aspect. In the second clause of the first section it ordains: 'Any purchaser of grain, seed, hay or coal who shall deduct any amount

> from the actual weight or measure thereof, *under claim of right to do so by reason of any custom or rule of a Board of Trade, or pretense whatsoever,'* shall be deemed guilty of a misdemeanor, and shall be subject to a fine of not less than ten nor more than one hundred dollars for each offense. Thus we have a clearly defined criminal offense, complete in and of itself, denounced by the statute, and falling fully within the title of the act."
>
> Ex parte House vs. Mayes, 227 Mo., l. c. 634 (Record pp. 49-50).

Thus it will be seen by the construction of the Supreme Court of Missouri the statute under consideration is twofold. It has both a civil and a criminal aspect. It then becomes necessary for this Court to view the statute and the case at bar under the division of the statute to which this case properly belongs, to wit: the criminal feature. The Missouri Supreme Court, speaking further upon this question in its opinion, says:

> "What then is the question presented to us? Is it the validity of any civil contract as to the weight of grain? Not at all. The defendant is being prosecuted by the State for a violation of the criminal feature of this law, which prohibits him as a purchaser of grain, seed, hay or coal from deducting any amount from the actual weight thereof, *under a claim of right to do so by virtue of a custom or rule of a Board of Trade.* He has not asserted and does not claim that he has any contract with the seller to deduct the one hundred pounds from the weight of the car of wheat, but lays claim to such deduction *only by virtue of the said rule eighteen of the Kansas City Board of Trade,* and

> this is the offense for which he is being prosecuted."

Ex parte House vs. Mayes, 227 Mo., l. c. 635. (Record p. 50.)

The agreed statement of facts under this construction of the statute by the Court discloses that plaintiff in error is prosecuted for the violation of a criminal statute and that the validity of a civil contract or his right to contract as to the sale and weight of grain is not involved and his constitutional rights to contract not abridged. The plaintiff in error did not make the deduction by reason of a contract as to weight, but because of the rule of the Board of Trade, and against which the penal part of the statute is leveled. The agreed statement of facts is out of tune with the questions raised and assignment of error, presented. He must answer to that part of the statute under which he is prosecuted.

B.

PLAINTIFF IN ERROR CHALLENGES THE VALIDITY OF THE ACT AS TO A FEATURE NOT INVOLVED IN THIS CASE. THE COURTS WILL NOT PASS UPON THE CONSTITUTIONALITY OF THE CIVIL DIVISION OF THE STATUTE UNTIL THE RIGHTS OF SOMEONE ARE INVOLVED AND CAN BE AFFECTED.

The Supreme Court of Missouri has held that it will not pass upon moot cases or upon the constitutionality of a statute until the rights of some person are involved or can be affected by the judgment of the Court. The Court, in its opinion in this case on this subject, expressed itself in the following language:

> "And he claims exemption therefrom, because he says the act is unconstitutional because it violates his freedom of contract, because the statute says *all sales* shall be made on the basis of actual weight. In our opinion, the validity of this provision as to the actual weight is not involved in this case, and this Court is not required upon this record to determine the constitutionality of that feature of the act, and defendant is in no attitude to demand a decision thereon, because its solution would neither aid nor injure him. This Court has time and again held that it will not pass upon the constitutionality of an act of the Legislature until the rights of someone can be affected by our judgment. State vs. Hathaway, 106 Mo., l. c. 240; State vs. Seebold, 192 Mo., l. c. 730, 731; State vs. McIntosh, 205 Mo., l. c. 604. It will be time enough to consider the validity of the civil features of this act when the validity of some contract as to the weight of grain is involved in some action which requires the determination of the constitutionality of these portions of the act relating to them. They are not involved in this proceeding, which is a prosecution for a violation of the only penal provision in the law, and even if invalid would not render the penal clause void, because it can stand on its validity and is not dependent upon the others."

Ex parte House vs. Mayes, 227 Mo., l. c. 635. (Record p. 50.)

This same holding was made by the Supreme Court of Missouri in the following cases:

State vs. Hathaway, 106 Mo., l. c. 240.

State vs. Seebold, 192 Mo., l. c. 730, 731.

State vs. McIntosh, 205 Mo., l. c. 604.

Laurel Hill Cemetery vs. San Francisco, 216 U. S. 358.

Hatch vs. Reardon, 204 U. S. 152.

To like effect has been the holding of the Supreme Court of the United States. In fact, this position is neither challenged by the Courts nor text writers.

Citizens' National Bank vs. Kentucky, 217 U. S. 443.

The civil and penal features of the statute in question being separate and distinct and neither being dependent upon the other, the plaintiff in error in being prosecuted under the criminal provision of the statute cannot invoke as a defense what he deems the unconstitutionality of the civil portions of the act. Indeed, the fact of whether or not the civil provision is constitutional or unconstitutional is not helpful in any wise to the plaintiff in error in this case. When a cause of action arises under the civil portion of the statute it will then be time enough for plaintiff in error to raise the questions he now assigns. The grounds upon which he challenges the right of the State to prosecute him in this case are not involved and cannot be passed upon by the Courts in the criminal prosecution. The Supreme Court of Missouri has so construed the statute, and in reviewing the decision on writ of error the Supreme Court of the United States will adopt the construction of the statute as made by the Missouri Court and be bound thereby.

C.

THE LEGISLATURE HAS THE RIGHT TO ENACT LAWS PREVENTING AND ABOLISHING SELF-IMPOSED RULES OF BOARDS OF TRADE WHICH HAVE BEEN ADOPTED AS TO WEIGHTS AND MEASURES. SUCH LEGISLATION IS WITHIN THE POLICE POWER OF THE STATE. THE STATE CAN ABOLISH ANY CUSTOM OR USAGE AMONG MERCHANTS OR OTHERS AS TO WHAT SHALL CONSTITUTE THE UNIT OF WEIGHT.

(1) The Legislature in the exercise of its police power is not confined to regulations looking to the preservation of life, health, good order and decency. Under the decisions of the various State Courts and the Supreme Court of the United States the police power embraces every law which concerns the welfare of the whole or any part of the people of the State, whether it relates to their rights or duties, whether it respects them as men or citizens of the State, whether in their public or private relation, whether it relates to the rights of persons or property of the whole people of the State or of any individuals in it, and operates upon the persons and things within it.

In speaking of this feature of the case the Supreme Court of Missouri, in its opinion in this case, said:

> "The Legislature in the second clause of section one of the act denounces and strikes at a custom and a rule of the Board of Trade which arbitrarily assumes a right to take from every

> shipper of grain, seed, hay or coal one hundred pounds of every carload thereof, sold on said Board, without his knowledge or consent, or if known to him, he is powerless to prevent or obtain any adequate redress. In a concise form, the contention of petitioner is that the General Assembly of this State is powerless to prevent the practice of the Kansas City Board of Trade in taking and apportioning to its members one hundred pounds of the weight of every carload of wheat purchased by them on said Board of Trade, whether the same be clean or contains dirt, without the knowledge or consent of the consignor thereof, solely by virtue of this rule or pretense to that effect, made by itself, and without other authority, and that the said custom and rule cannot be abrogated by the General Assembly of this State.
>
> "That the inspection and regulation of weights and measures are within the police power of the States, and laws passed by the Legislature for such inspection and regulation requiring dealers and traders to conform thereto and for the appointment or election of officers or inspectors thereunder, are in the nature of police regulations and not repugnant to the Constitution of the United States or of this State can no longer be doubted."

Ex parte House vs. Mayes, 227 Mo., l. c. 636. (Record pp. 50-51.)

Mr. Justice Field, in delivering the opinion of the Supreme Court of the United States in the case of Pittsburg and Southern Coal Co. vs. Louisiana, 156 U. S. 590, said:

> "There is nothing in the provisions of the act of Louisiana providing for the appoint-

ment of two gaugers of coal and coke boats, which can properly be considered as regulations of commerce, in conflict with the power vested in Congress over the subject. They only prescribe the rule by which the capacity of the carrying vessels of coal and coke can be determined and the weight of the coal or coke carried ascertained, which may be readily done at any time. They were adopted for the convenience of the owners of the boats and loads. They are properly to be regarded as a part of those innumerable police regulations which every State may enact for the convenience and comfort of its inhabitants in the conduct of their business.''

The Supreme-Court of Missouri, in its opinion in the case at bar, 227 Mo., l. c. 636, continuing, said:

> ''Legislation along these lines is found in almost every country, the underlying purpose of which is to secure uniform weights and measures and to guard the people at large against defective and uncertain weights and measures and fraudulent practices connected therewith. While the act we are called to construe in this case is not aimed at fraudulent and illegal weighing of the commodities named therein, it is aimed at practices which are closely akin to fraudulent weighing. (State vs. Wilson, 61 Kansas 32; Cooley on Constitutional limitations, 6 Ed. 744.) Of what benefit would it be to the shipper of grain to the grain markets like Kansas City to be assured that their grain was properly weighed, if after it had been correctly weighed the toll of one hundred pounds to the carload, or any other amount, which the Board of Trade might determine, should be taken with-

> out the knowledge or consent of the shippers by virtue of this so-called rule or practice? The result to him will be the same as if fraudulent scales were used by which his grain was made to weigh one hundred pounds less on the car load, without his knowledge or consent.
>
> The inhibition of this act is against the deduction of any amount from the actual weight or measure *under claim of right to do so by reason of any custom or rule of the Board of Trade or by any pretense whatsoever.* This is the unequivocal language of the act itself, and the agreed statement of facts demonstrated that the Board of Trade, by section 18 of its rules, claims the right to have an allowance of one hundred pounds per car on all grain bought by the members of the Board of Trade from the Kansas City unloading weights, and in this case the petitioner deducted one hundred pounds from the carload of wheat bought by him from Anderson on the first day of September, 1909, under and by virtue of this rule 18 *alone,* and not by virtue of any contract made with the shipper whom Anderson represented in the sale, and the agreed statement further shows that Anderson had never apprised his principal of this rule and this custom and obtained his consent to such a deduction from the actual weight of the wheat. Obviously this legislation is aimed at this rule and this custom which the Board of Trade has made for itself." (Record p. 51.)

The statute is leveled at rule 18, which is set out in the agreed statement of facts, a rule arbitrarily adopted by the Board of Trade, whereby it arbitrarily deducts from every car of grain one hundred pounds of its weight. This prosecution is for the deduction of the one hundred pounds by reason of the rule. The prosecution is not because of the one hundred pounds being deducted on account of a contract having been made to that effect. The statement of facts agreed to in this case discloses the deduction was made on account of the rule and was not made because of any contract, pretended or otherwise, between the shipper whom Anderson represented in the sale and the purchaser, and which agreed statement further shows that Anderson had never apprised the principal of any such rule or custom. The Legislature unquestionably was acting within its police powers when it made it a misdemeanor to arbitrarily make a deduction of one hundred pounds from the weight of every car of grain by reason of any such rule.

The Supreme Court of Missouri, in its opinion in this case, 227 Mo., l. c. 638, in addressing itself to this phase of the case, said:

> "The Legislature had the right to enact this law to prevent and to abolish this self-imposed rule of the Board of Trade, and in so doing it but exercised a part of the Legislative power of the State to prevent unfair and fraudulent practices in the sale of grain consigned to the Kansas City market. That a custom of usage among merchants or others as to what shall constitute a "ton" or other unit of weight can be abolished by the Legislature has been adjudged wherever that question has been raised." [Green vs. Moffitt, 22 Mo. 529; Evans vs. Myers, 25 Pa. St. 114; Noble vs. Durrell, 3 T. R. 271; St. Cross vs. Howard, 6 T. R. 338; Mayes vs. Jennings, 4 Hun (Tenn.) 102; Harris vs. Rutledge, 19 Ia. 388.] (Record pp. 51-52.)

(2) The deduction of the one hundred pounds, as made by the rule, is a fraud or trespass upon the rights of others. It is the duty of the State to prevent same, because the action to recover is not adequate on account of the frequency and multiplicity of the acts. The opinion of the Court in this case, 227 Mo., l. c. 638, discussing this proposition, contains the following:

> "Tiedeman, in his work on State and Federal control of persons and property, Vol. 1, p. 260, says: "A fraud is, of course, a trespass upon another's rights, and can always be punished, when committed. It is, therefore, but rational to suppose that the State may institute any reasonable preventative remedy, *when the frequency of the fraud or the difficulty experienced in circumventing them* is so great that no other means will prove efficacious. Where, therefore, police regulations are established, which give to private parties increased facilities for detecting and preventing fraud, as a general proposition, these laws are free from all constitutional objections. Laws which provide for the inspection and grading of flour, the inspection of tobacco, the inspection and regulation of weights and measures, the regulation of weight of bread, requiring all lumber to be surveyed by a public surveyor, providing for the weighing of coal and other articles of heavy bulk on the public scales, are constitutional exercises of police power, so far as they permit one party to compel the other to comply with the regulation, in the absence of their agreement to the contrary. For example, it is permissible for a statutory regulation to provide for standard weights and measures, and to compel their use, when the parties have not

> agreed upon the use of others.'' In People vs. Wagner, 86 Mich. 594, an ordinance of the City of Detroit, providing that all bread manufactured by the bakeries of the city, for sale, shall be made into loaves of one, two and four pounds, and no other, and forbidding them to sell or exhibit for sale any bread that shall be deficient in weight, was assailed as unconstitutional, but was sustained by the Court. The Court said: ''The police power of the State is not confined to regulations of the preservation of life, health, good order and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objections. [Tiedeman's Limitations of Police Powers, Sec. 89, p. 208.]'' And it is on this principle that the oleomargering act and the milk ordinances of St. Louis and other cities have been sustained. That the act in this regard is clearly within the police power of the State we think there can be no doubt. In the first place, it aims at nothing but simple, common honesty. (Record p. 52.)

(3) The law is in the interest of fair dealing and common honesty. It prevents the taking of the property of the citizen by arbitrary rule without that ''due process of law'' about which plaintiff in error has said so much. The Supreme Court of Missouri very forcibly expresses itself upon this subject as follows:

> ''In view of the wide extent of such an exaction, it falls within 'the rule that whenever the public (or the law-making power) deems an act of private wrong to be of a nature requiring its intervention for the protection of the individual

> it holds the act punishable at its own suit; in other words, it makes it a crime. Bishop's New Criminal Law, Sec. 234. It seems to us that an act of the Legislature so inherently right in itself according to the laws of fair dealing and morality, needs no extended reasoning to show that it is clearly within the Legislative powers conferred upon the General Assembly by the Constitution. It prohibits merely the taking of one man's property by another without compensation. It imposes no unjust burden upon the purchaser, but simply inhibits his deducting from the wheat he purchases a part thereof which he would take without paying the seller therefor, by virtue, not of an agreement with the seller, but by virtue of a rule made by an association of which he is a member."

Ex parte House vs. Mayes, 227 Mo., l. c. 641. Record pp. 53-54.

In the case of McLean vs. Arkansas, 211 U. S., l. c. 550, Mr. Justice Day, speaking for the Court, said:

> "Laws tending to prevent fraud and to require honest weights and measures in the transaction of business have frequently been sustained in the Courts, although in compelling certain modes of dealing they interfere with the freedom of contract. Many cases are collected in Mr. Freund's book on 'Police Power,' Sec. 274, wherein that author refers to laws which have been sustained, regulating the size of loaves of bread when sold in the market; requiring the sale of coal in quantities of five hundred pounds or more by weight; that milk shall be sold in wine measure, and kindred enactments."

In construing these statutes mentioned by Mr. Justice Lurton in the above quotation, taken from his opinion, it was held by the Courts sustaining the law that the police power of the State is not confined to regulations looking to the preservation of life, health, good order and decency. As was said by the Missouri Supreme Court in this case (Record p. 51), laws providing for the detection and prevention of imposition and fraud are free from constitutional objections as a general proposition. And to the same principle is assent given in Tiedeman's Limitations of Police Power, Sec. 89, p. 208.

(4) This arbitrary rule is a mere pretext or pretense under cover of which one hundred pounds is taken from the weight of grain and certain other commodities, irrespective of the fact whether or not it does in fact contain dirt or other foreign substance. Jones' car of grain may not contain an ounce of dirt, yet they deduct one hundred pounds. They do so, they say, on the theory that Smith may send a car with two hundred pounds of dirt. They then take from Jones one hundred pounds of grain, his property, and do so arbitrarily and present it to Smith. This pretext or pretense cannot avail plaintiff in error. The Court must bear in mind that the hundred pounds has been taken, not by virtue of a contract between the buyer and the seller, but was taken by virtue of rule eighteen as adopted and promulgated by the Board of Trade. Speaking as to this pretext and the taking of the property of, the Court has expressed itself in its opinion in this case in the following apt language:

> "The Legislature regarded the said rule as a pretense; that is to say, a pretext, something held out as real when it is not so, a deception, and

> accordingly made it a misdemeanor in order to prevent it, and of its power to punish it as such we think there can be no doubt.
>
> "Petitioner insists that by prohibiting him from making the deduction of one hundred pounds his property is taken without due process of law. We agree with the Attorney-General that he has reversed the conditions. To strike down this act will be to permit him to continue to take the shipper's property without due process of law and without any compensation therefor.
>
> "Without further elaboration, we are of the opinion that this act is a valid one and it is wisely aimed to prevent unjust and unfair practice and to repeal and nullify a rule of the Board of Trade which is unjust and unfair and contrary to the good morals and fair dealings, and the act offends against no provision of the Constitution."

House vs. Mayes, 227 Mo., l. c. 642. Record p. 54.

(5) The public has such an interest in and is so affected by the dealings of Boards of Trade, that the Legislature can control same. The Court, in its opinion on this point, has so expressed itself. We take the following extract from the opinion:

> "The business of the Board of Trade and its members in the handling, buying and selling of the grain is such that the public has an interest therein and is so largely affected thereby that the Legislature controlling it is justifiable, under the decisions of the Supreme Court of the United States in Munn vs. Illinois, 94 U. S. 113; Budd vs. New York, 143 U. S. 517, and Brass vs. North Dakota, 153 U. S. 391." Record p. 54.

We have in this division of the brief (Division I) reviewed the construction given the statute in question by the Supreme Court of the State of Missouri and brought to the attention of the Court practically all of the features of the opinion. This was done by reason of the fact that the majority opinion of the Court is so strong it is sufficiently convincing within itself, and because this Honorable Court under its decisions will be bound by and accept the construction placed upon the statute by the Supreme Court of Missouri. When that construction is given it by this Honorable Court then there is no Federal question involved in this case. There is no question involving the validity of a contract nor the right of plaintiff in error to contract. In other words, there is no question involving any of the rights given a citizen under the Constitution of the United States. The law makes it a misdemeanor to, under claim of right so to do by reason of any custom or rule of the Board of Trade or any pretense whatever, deduct one hundred pounds from the actual weight of the commodity named in the act. Plaintiff in error is prosecuted for making the deduction because of rule eighteen, adopted by the Board of Trade and set out in the agreed statement. He is prosecuted for nothing else. His right of contract is not in question and cannot be raised in this cause. Should that question be raised on the civil side of the statute the State will then brief those questions and demonstrate clearly that the civil part of the statute violates no constitutional right.

D.

SEPARATE CONCURRING OPINION OF JUDGE WOODSON.

Justice Woodson concurred in the majority opinion, and also wrote a separate concurring opinion. His separate concurring opinion is also concurred in by Burgess, Gantt and Lamm, JJ. The opinion being short and expressing additional views of the majority members of the Court sustaining the statute, we print same in full at this point in our brief. It is a strong and forceful presentation of the questions, and is as follows:

> "I concur in the views of Judge Gantt expressed in this case for the additional reasons that the design the Legislature had in passing the act in question was two-fold; first, by section one, to prevent brokers from agreeing with the purchasers of wheat on Boards of Trade from deducting any part therefrom without authority from the owner to so do, notwithstanding the existence of a rule or custom to the contrary. It cannot be seriously contended that said section is unconstitutional for that reason. The books are full of cases upholding the validity of such laws.
>
> "The second purpose the Legislature intended to accomplish by the passage of this act was to prevent the purchaser of wheat on the floors of exchanges from deducting any quantity from the amount so purchased where the contract of purchase does not authorize such deduction. In other words, the act was simply designed to prevent one person from taking the property of another without compensation and without his

consent. That certainly is a valid law, for the reason that it is based upon express provisions of both the State and Federal Constitutions, which provide that private property shall not be taken for private use with or without just compensation.

"The clear import and meaning of the rule in question is to authorize the purchaser of wheat "on change" to take private property without the owner's assent and without compensation, which was being done under this rule at the time of the passage of this act. By the second section of this act the Legislature intended to prevent that wrongful practice.

"In the case at bar, the agreed statement of the facts show that the broker who sold the wheat mentioned therein had no authority in fact to authorize House, the petitioner, to deduct the hundred pounds of wheat mentioned from the quantity purchased by him. Notwithstanding his lack of authority, the petitioner deducted that hundred pounds and now retains it without paying for it. This act of the Legislature declares that act of the petitioner to be a misdemeanor and punishable by fine. In my judgment that is a valid law and should be enforced.

"Suppose, for instance, the rule in question, instead of being simply a rule of the Board of Trade had been an act of the Legislature, and had provided just as the rule in effect does, that all purchasers of wheat 'on change' may, without authority from the owners therof, deduct from each car load purchased the sum of one hundred pounds without compensation, would or could it be contended that such an act would be constitutional? Certainly not. That being true, then clearly the rule itself, for stronger reasons, is void, and the Legislature unquestionably has the authority not only to fine but also to imprison all who take property of others without their consent.

"If this Board of Trade has the authority to adopt the rule in question, deducting one hundred pounds from each car load purchased made upon its floors, then clearly by virtue of the same authority it has the power to deduct from each sale two hundred pounds or any other quantity deemed proper, only limited by the avarice and greed of a majority of its members.

"In answer to a question propounded by the writer to counsel for the petitioner during the oral argument of this cause, he stated in response thereto that there was sold on an average on the floor of the Kansas City Board of Trade 500 cars of wheat a day. If we deduct from each car of wheat so sold one hundred pounds for each day in the year, it will show that the owners of wheat are annually, by this rule, deprived of three hundred and four thousand, one hundred and sixty-six bushels, and that, too, without their consent and without compensation. If the same rule be extended to St. Louis, St. Joseph and other grain markets of the State, then the quantity will be swollen to probably a million bushels.

"This rule is w rong and vicious and should be condemned, as the Legislature has undertaken to do by this act; and this act is wise and just and should be upheld and enforced." (Rec. pp. 55-56.)

II.

THIS COURT WILL ACCEPT THE CONSTRUCTION AND INTERPRETATION OF A STATUTE OF A STATE AS GIVEN SAME BY THE HIGHEST COURT OF THE STATE. THE CONSTRUCTION GIVEN THE STATUTE IN QUESTION BY THE SUPREME COURT OF MISSOURI WILL BE ACCEPTED BY THE SUPREME COURT OF THE UNITED STATES AS CONCLUSIVE THEREON.

(1) It is no longer an open question that the interpretation placed upon a statute by the highest court of a State will be accepted as conclusive by this Honorable Court. We have seen from Division I of this brief the construction placed upon the statute involved by the Supreme Court of Missouri. That said statute was construed to have a twofold aspect, to wit: a civil and a criminal side. That plaintiff in error was being prosecuted under the criminal portion. That the criminal portion set out a complete statutory offense within itself and within the title to the act. That in this prosecution under the agreed statement of facts there was no question raised or presented involving plaintiff in error's right to contract as same is guaranteed to him under the Constitution of the United States. That he was prosecuted for deducting one hundred pounds of grain from the weight of a carload of wheat by reason of a certain arbitrary rule fixed and adopted by the Kansas City Board of Trade. That this act was justly made and constituted an offense by the legislature, and same was within the exercise of the police power of the State. That he had

no contractual rights which could be affected by the judgment of the court in this case. That the same would not involve any of his constitutional rights. That his contractual rights under the Constitution might be determined when the validity of some contract as to the weight of grain was involved under the civil portion of the statute. That the prosecution in this case was leveled at a rule of the Board of Trade under the act and not at a contract. That the deduction as made is a fraud or trespass upon the rights of others. That the law is in the interest of fair dealing and common honesty.

Now the construction of the statute as given by the State Supreme Court is binding and conclusive upon this Honorable Court.

In Smiley vs. Kansas, 196 U. S. l. c. 454-5, Mr. Justice Brewer, speaking for the court, said:

> "It may be conceded for the purposes of this case that the language of the first section is broad enough to include acts beyond the police power of the State and the punishment of which would unduly infringe upon the freedom of contract. At any rate, we shall not attempt to enter into any consideration of that question. The Supreme Court of the State held that the acts charged and proved against the defendant were clearly within the terms of the statute, as well as within the police power of the State; and that the statute could be sustained as a prohibition of those acts, irrespective of the question whether its language was broad enough to include acts and conduct which the legislature could not rightfully restrain.

> It is well settled that in cases of this kind the interpretation placed by the highest court of the State upon its statutes is conclusive here. We accept the construction given to a state statute by that court. *St. L., I. M. & St. P. Ry. Co. vs. Paul,* 173 U. S. 404, 408; *M., K. & T. Ry. Co. vs. McCann,* 174 U. S. 580, 586; *Tullis vs. L. E. & W. R. R. Co.,* 175 U. S. 348. Nor is it material that the State Court ascertains the meaning and scope of the statute, as well as its validity, by pursuing a different rule of construction from what we recognize. It may be that the views of the Kansas court in respect to this matter are not in harmony with those expressed by us in *United States vs. Reese,* 92 U. S. 214; *Trade-Mark Cases,* 100 U. S. 82; *United States vs. Harris,* 106 U. S. 629, and *Baldwin vs. Franks,* 120 U. S. 678. We shall not stop to consider that question nor the reconciliation of the supposed conflicting views suggested by the Chief Justice of the State. The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined."

In the case of W. W. Cargill Co. vs. Minnesota, 180 U. S. 466-7, Mr. Justice Harlan, discussing this same rule of practice, said:

> "The questions just stated are questions of local law, and in determining whether the statute violates any right secured by the Federal Constitution we must, in the particulars named, accept the interpretation put upon it by the State Court. In *Tullis vs. Lake Erie &*

> *Western Railroad,* 175 U. S. 348, 353, the question was as to the constitutionality of a statute of Indiana relating to railroads and other corporations, except municipal corporations. The Supreme Court of that State held that the statute was capable of severance, and that its provisions as to railroads were not so connected in substance with the provisions relating to other corporations that their validity could not be separately determined. This court followed that view, declaring it to be an elementary rule that it should adopt, the interpretation of a statute of a State affixed to it by the court of last resort thereof.' See also *Missouri Pacific Railway Co. vs. Nebraska,* 164 U. S., 403, 414; *Chicago, Milwaukee, etc., Railway Co. vs. Minnesota,* 134 U. S. 418, 456; *St. Louis, Iron Mountain, etc., Railway vs. Paul,* 173 U. S. 404, 408."

In Waters-Pierce Oil Co. vs. Texas, 177 U. S. l. c. 42-3, Mr. Justice McKenna stated the rule thus:

> "The courts of Texas have like power of interpretation of the statutes of Texas. What they say the statutes of that State mean we must accept them to mean whether it is declared by limiting the objects of their general language or by separating their provisions into valid and invalid parts. *Tullis vs. Lake Erie & Western Railroad,* 175 U. S. 348; *St. Louis, Iron Mountain, etc., Railroad vs. Paul,* 173 U. S. 404."

Again, in the case of Missouri Pacific Ry. Co. vs. Nebraska, 164 U. S. l. c. 414, Mr. Justice Gray, speaking for the court, said:

> "The Supreme Court of Nebraska has construed this statute as authorizing the Board of Transportation to make the order questioned in this case which required the Railroad Company to grant to the relators the right to erect an elevator upon its right of way at Elmwood Station, on the same terms and conditions on which it had already granted to other persons rights to erect two elevators thereon. The construction so given to the statute by the highest court of the State must be accepted by this court in judging whether the statute conforms to the Constitution of the United States."

This Honorable Court then, in passing upon the statute involved, must accept the construction placed thereon by the Supreme Court of Missouri as set forth in its opinion and to which special attention has been directed in this brief, in determining whether or not the statute violates any Federal Constitutional right or rights guaranteed to the plaintiff in error. Under the construction so given there is no constitutional question raised as to the validity of a contract made by plaintiff in error or any in which his contractual rights are involved.

(2). This court will not disregard the construction of a State statute by the State court and affixed to the statute a meaning or construction adverse to that given it by the State court and repugnant to the Constitution of the United States. Under the construction given the statute as to the prosecution of Mr. House, there is no possible way in which a Federal question can arise or be involved. This Honorable Court will not disregard that construction and affix a construction contrary to the one given by the Missouri Supreme Court and affix a construction repugnant to the Federal Constitution.

> Mo., Kan, & Texas Ry. vs. McCann, 174 U. S. l. c. 586.
>
> Tullis vs. L. E. & W. R. R. 175 U. S. l. c. 353.

(3). *The statute being enforced against plaintiff in error, should, therefore, be applied as construed by the Missouri Supreme Court and as if that construction had been incorporated in the letter of the statute by the legislature.*

To accomplish this end this Honorable Court will take judicial notice of the decisions of the courts of Missouri construing the statute.

> Lamar vs. Micou, 114 U. S. l. c. 223.
>
> Liverpool Steam Co. vs. Phoenix Ins. Co. 129 U. S. l. c. 445.

(4). If a state statute as construed by the highest court of the state is constitutional, this court will follow that construction.

In Gatewood vs. North Carolina, 203 U. S. l. c. 541, Mr. Justice White, speaking for the court, said:

> "In the argument it is insisted that the construction given by the Supreme Court of North Carolina to the statute is wrong, since in effect it reads out the provisions of section 7, and it is urged that it is the duty of this court to disregard the interpretations affixed by the state court, thereby bringing the statute within the prohibitions of the Fourteenth

> **Amendment. But it is elementary that, under the circumstances, we must follow the construction given by the state court, and test the constitutionality of the statute under that view. *Armour Packing Co. vs. Lacy,* 200 U. S. 226; *Smiley vs. Kansas,* 196 U. S. 447, 445, and cases cited.''**

Again, in N. Y. Central Railroad vs. Miller, 202 U. S. l. c. 595, Mr. Justice Holmes stated the rule to be:

> ''The argument for the relator had woven through it suggestions which only tended to show that the construction of the New York statute by the court of appeals was wrong. Of course, if the statute as construed is valid under the Constitution, we are bound by the construction given to it by the state court.''

In Strickley vs. Highland Boy Mining Co., 200 U. S. l. c. 530, the court said:

> ''If the statutes are constitutional as construed, we follow the construction of the state court.''

In Soper vs. Lawrence Brothers, 201 U. S. l. c. 370-1, the court said:

> ''Of course, if the statute as construed by the state court is constitutional, we follow its construction. *Tampa Water Works Co. vs. Tampa,* 199 U. S. 241, 243.''

Furthermore, the state court in its majority opinion by Judge Gantt found from the agreed statement of facts *that no contract was ever made between plaintiff in error and*

the commission man who sold him the carload of wheat, nor the owner of the grain authorizing plaintiff in error to take the one hundred pounds of wheat without paying for it.

(5) The court found from the agreed statement of facts that plaintiff in error took the one hundred pounds of grain from the owner thereof, not by any right of contract, but "ONLY BY VIRTUE OF THE SAID RULE 18 OF THE KANSAS CITY BOARD OF TRADE." ***This Court is as conclusively bound by that finding of fact by the State Supreme Court as by the construction of the statute by that Court.***

Texas & Pacific Ry. vs. Abiline Cotton Oil Co., 204 U. S. 426.

Missouri Pacific Ry. Co. vs. Kansas, 216 U. S. 262.

Gulf, Colorado & Santa Fe Ry. vs. Texas, 204 U. S. 403.

Chicago & Burlington Ry. vs. Chicago, 166 U. S. 226.

Londoner vs. Denver, 210 U. S. 373.

The following authorities fully sustain the propositions hereinabove announced, in addition to the authorities heretofore cited:

Grenada Lumber Co. vs. Mississippi, 217 U. S. 433.

Brown-Forman Co. vs. Kentucky, 217 U. S. l. c. 573.

Olsen vs. Smith, 195 U. S. l. c. 342.

Maiorano vs. Baltimore & Ohio R. R. Co., 213 U. S. l. c. 273.

Jacobson vs. Massachusetts, 197 U. S. l. c. 24.

Tullis vs. Lake Erie & W. R. R., 175 U. S. l. c. 353.

Yazoo & Miss. Val. R. Co. vs. Adams, 181 U. S. l. c. 583.

(6) On writ of error this Honorable Court does not deal with the *facts* of the case. *It accepts those as found by the State Court.*

King vs. West Virginia, 216 U. S. l. c. 100.

Behn vs. Campbell, 205 U. S. 403, 407.

No one can seriously contend for a moment that the construction given this statute by the majority opinion of the Supreme Court of Missouri in the least interferes with the right of plaintiff in error to contract. No right guaranteed to him under the Federal Constitution being involved, there is nothing before this Honorable Court for review, and the judgment should be affirmed.

III.

THE DEDUCTION OF ANY AMOUNT FROM THE ACTUAL WEIGHT OF CERTAIN COMMODITIES BY REASON OF ANY CUSTOM OR RULE OF A BOARD OR TRADE OR ANY PRETENSE IS A MISDEMEANOR UNDER THIS STATUTE AS CONSTRUED. PLAINTIFF IN ERROR DEDUCTED ONE HUNDRED POUNDS FROM THE WEIGHT OF A CAR OF GRAIN ON ACCOUNT OF RULE EIGHTEEN OF THE BOARD OF TRADE. HE HAS COMMITTED A MISDEMEANOR AND IS ON THE CRIMINAL SIDE OF THE STATUTE. HE MUST SPEAK FROM

THAT SIDE AND FROM THAT CLASS. HE CANNOT BE HEARD ON THE CIVIL SIDE BECAUSE HE HAS NOT PLACED HIMSELF WITHIN THAT CLASS.

It is not made an offense under the statute to deduct any amount from the actual weight by reason of a contract made and entered into between the buyer and seller. The offense for which one can be prosecuted is making any deduction from the actual weight by reason of any custom or rule of a board of trade or any *pretense.* The plaintiff in error in this case is being prosecuted for taking one hundred pounds from the actual weight of a car of wheat because of rule eighteen of the board of trade of Kansas City. The question is therefore simple and plain and without difficulties.

The plaintiff in error has raised questions as to his contracts or his constitutional rights to contract. These have no part in the case. He has briefed and argued his case just as though the Supreme Court of Missouri has not construed the statute, and had not given it both a civil and criminal side or aspect, and just as though it had not placed him under his agreed statement of facts on the criminal side.

Notwithstanding this, plaintiff in error raises and argues questions which can arise solely on the civil side. He proceeds just as if the construction given the statute by the Supreme Court of Missouri was of no concern in considering the question as to the validity of the statute in this Court. The construction of the statute is conclusive and binding upon the Supreme Court of the United States.

The questions of the constitutional rights of plaintiff in reference to his civil contracts can only arise between himself and some citizen on the civil side of the statute and in an action to recover whatever deductions might be made by virtue of some contract. When he has such a case, and when the Supreme Court of Missouri has passed on same under the civil side of this statute, then, and not until then, can the questions be raised and the same passed upon by the Court.

This is a criminal prosecution undertaken by the State for the violation of a penal statute, and is not an action to recover or to raise any question on the civil side of the statute. Plaintiff in error falls in the class belonging to the criminal side. As he does not belong to the class of persons affected by the civil side of the statute, he cannot raise the question in this case as to the constitutionality of the civil part of the statute as to affecting his rights to contract.

This principle is well settled in the following decisions in this Court.

Laurel Hill Cemetery vs. San Francisco, 216 U. S. 358.

Citizens National Bank vs. Kentucky, 217 U. S. 443.

Hatch vs. Reardon, 204 U. S. 152.

Austin vs. the Aldermen, 7 Wall. 690.

Supervisors vs. Stanley, 105 U. S. 305.

The Winnebago, 205 U. S. 354.

In the case of Citizens National Bank vs. Kentucky, 217 U. S. l. c. 453, Mr. Justice Lurton, speaking for the court, said.

> "As thus applied, the bank has neither been deprived of any rights nor compelled to bear any burden in conflict with section 5219, Rev. Stat., upon which it relies for protection. But if it be assumed—an assumption not sustained by any decision of the Kentucky Court of Appeals—that the third section is broad enough to include liability for delinquent taxes claimed from both resident and nonresident stockholders, none of the latter class are here complaining, and such an objection cannot be made by one unaffected by the alleged invalid feature."

In the case of Hatch vs. Reardon, 204 U. S. l. c. 160, Mr. Justice Holmes, speaking for the Court, said:

> "But there is a point beyond which this Court does not consider arguments of this sort for the purpose of invalidating the tax laws of the State on constitutional ground. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the State law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this Court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if, for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all."

IV.

MAKING THE DEDUCTION OF ANY AMOUNT FROM THE ACTUAL WEIGHT OF CERTAIN COMMODITIES BY REASON OF ANY CUSTOM OR RULE OF A BOARD OR TRADE A MISDEMEANOR AS PROVIDED IN THE MISSOURI STATUTE IS A VALID EXERCISE OF THE POLICE POWER OF THE STATE.

This question has been so fully and ably covered by the majority opinion written by Mr. Justice Gantt of the Supreme Court of Missouri in this case (227 Mo., p. 617), record pages 46 to 55, inclusive, that it would serve no useful purpose to reargue same here.

Suffice it to say that this statute, as construed by the Supreme Court of Missouri, is a valid exercise of the police power for many reasons, among them being the following: It strikes at a custom or rule of a board of trade which arbitrarily assumes the right of making deductions from the actual weight of certain commodities; it guards against fraudulent practices and false weight; it tends to prevent frauds and requires honest weights in the transaction of business; it is a regulation of weights and measures, all of which laws fall within the police powers; it prevents a fraud or trespass upon the rights of others; it is in the interest of fair dealing and common honesty and protects the public against arbitrary and unjust exactions; it makes such arbitrary deductions an offense by reason of being a mere pretext or pretense; it violates no contractual rights of the citizen and does not abridge the privileges or immunities of any citizen, neither does it deprive any citizen of his property without due process of law, nor deny to plaintiff the equal protection of the laws as guaranteed under the Fourteenth Article of Amendment to the Federal Constitution.

For the above reasons and many others this statute has been held a valid exercise of the police power of the State by the Supreme Court of Missouri, extracts from the opinion of which have been heretofore set out in this brief. Other decisions along with the Missouri decision supporting this statute upon principle and analogy as a proper exercise of the police power of the State are as follows:

Ex parte House vs. Mayes, 227 Mo. l. c. 636, 638, 639, 641 and 642.

30 Amer. & Eng. Ency. Law (2 Ed.), 451.

People vs. Wagner, 86 Mich. l. c. 599.

State vs. Wilson, 61 Kas. 32.

Pittsburg Coal Co. vs. Louisiana, 156 U. S. 590.

Munn vs. Illinois, 94 U. S. 113.

Budd vs. N. Y., 143 U. S. 517.

Brass vs. North Dakota, 153 U. S. 391.

Cooley on Const. Lim. (6 Ed.), 744.

Green vs. Moffitt, 22 Mo. 529.

Evans vs. Myers, 25 Pa. St., 114.

Noble vs. Durrell, 3 T. R. 271.

St. Cross vs. Howard, 6 T. R. 338.

Mayes vs. Jennings, 4 Hum (Tenn.) 102.

Harris vs. Rutledge, 19 Ia. 388.

Tiedeman's Limitations of Police Power, Sec. 89, p. 208, and pp. 260-263.

Freund on Police Powers.

One Bishop's New Criminal Law, Sec. 234.

McLean vs. Arkansas, 211 U. S. l. c. 550 and 546.

Williams vs. Arkansas, 217 U. S. 79.

City of New York vs. Miln, 11 Pet., p. 105.

Thurlow vs. Massachusetts, 5 How. 628.

Holden vs. Hardy, 169 U. S. l. c. 380.

Bacon vs. Walker, 204 U. S. l. c. 317.

Welch vs. Swasey, 214 U. S. l. c. 105.

Chicago, Burlington & Quincy Ry. vs. Drainage Com's, 200 U. S. l. c. 592.

The police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as those to promote public health, morals or safety; it is not confined to the expression of what is offensive, disorderly or unsanitary, but extends to what is for the greatest welfare of the state.

In Bacon vs. Walker, 204 U. S. l. c. 317, Mr. Justice McKenna, in holding valid the statute of the State of Idaho, prohibiting the herding and grazing of sheep on or within two miles of land or processory claims of persons other than the owner of the sheep, said:

> "These cases make it unnecessary to consider the argument of counsel based upon what they deem to be the limits of the police power

> of a State, and their contention that the statute of Idaho transcends those limits. It is enough to say that they have fallen into the error exposed in *Chicago, Burlington & Quincy Railway Company vs. Drainage Commissioners*, 200 U. S. 561, 592. In that case we rejected the view that the police power cannot be exercised for the general well-being of the community. That power, we said, embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. We do not enter, therefore, into the discussion whether the sheep industry is legitimate and not offensive. Nor need we make extended comment on the two-mile limit. The selection of some limit is a legislative power, and it is only against the abuse of the power, if at all, that the courts may interpose. But the abuse must be shown. It is not shown by quoting the provision which expresses the limit. The mere distance expressed shows nothing. It does not display the necessities of a settler upon the public lands. It does not display what protection is needed, not from one sheep or a few sheep, but from large flocks of sheep, or the relation of the sheep industry to other industries. These may be the considerations that induced the statutes, and we cannot pronounce them insufficient on surmise or on the barren letter of the statute."

In McLean vs. Arkansas, 211 U. S. l. c. 546 et seq., in which a statute making it unlawful for mine owners employing ten or more men under ground in mining coal and paying by the ton mined, to screen the coal before it was weighed, was held valid; and also that it was not an unreasonable classification to divide coal mines into those where less than ten miners were employed and those where more than that number were employed, and that the State police regulation was not unconstitutional under the equal-protection clause of the Fourteenth Amendment because only applicable to mines where more than ten miners were employed.

This court, in discussing police power, said:

"In Gundling vs. Chicago, 177 U. S. 183, this court summarized the doctrine as follows:

> Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be, and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for federal interference."

In Jacobson vs. Massachusetts, 197 U. S. 11, this court said:

> "The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import absolute right in

each person to be at all times, and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necesarily subject for the common good."

It is then the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the Government in the exercise of its power to protect the safety, health and welfare of the people.

It is also true that the police power of the State is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner, such laws may be annulled as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself.

The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legistive power. Jacobson vs. Massachusetts, 197 U. S. 11; Mugler vs. Kansas, 123 U. S. 623; Minnesota vs. Barber, 136 U. S. 313, 320; Atkin vs. Kansas, 191 U. S. 207, 223.

If the law in controversy has a reasonable relation to the protection of the public health, safety or welfare, it is not to be set aside be-

> cause the judiciary may be of the opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the Government."

In Welch vs. Swasey, 214 U. S. l. c. 105, et seq., Mr. Justice Peckham, in holding valid a statute of Massachusetts limiting the heights of buildings in the city of Boston, under the police power, said:

> "The statutes have been passed under the exercise of so-called police power, and they must have some fair tendency to accomplish, or aid in the accomplishment of some purpose, for which the legislature may use the power. If the statutes are not of that kind, then their passage cannot be justified under that power. These principles have been so frequently decided as not to require the citation of many authorities. If the means employed, pursuant to the statute, have no real, substantial relation to a public object which government can accomplish; if the statutes are arbitrary and unreasonable and beyond the necessities of the case, the courts will declare their invalidity. The following are a few of the many cases upon this subject: *Mugler vs. Kansas,* 123 U. S. 623, 661; *Minnesota vs. Barber,* 136 U. S. 313, 320; *Jacobson vs. Massachusetts,* 197 U. S. 11, 28; *Lochner vs. New York,* 198 U. S. 45, 57; *Chicago Railway Company vs. Drainage Commissioners,* 200 U. S. 561, 593.
>
> In passing upon questions of this character as to the validity and reasonableness of a discrimination or classification in relation to

limitations as to height of buildings in a large city, the matter of locality assumes an important aspect. The particular circumstances prevailing at the place or in the State where the law is to become operative; whether the statute is really adapted, regard being had to all the different and material facts, to bring about the results desired from its passage; whether it is well calculated to promote the general and public welfare, are all matters which the state court is familiar with, but a like familiarity cannot be ascribed to this court, assuming judicial notice may be taken of what is or ought to be generally known. For such reason this court, in cases of this kind, feels the greatest reluctance in interfering with the well-considered judgments of the courts of a State whose people are to be affected by the operation of the law. The higest court of the State in which statutes of the kind under consideration are passed is more familiar with the particular causes which led to their passage (although they may be of a public nature) and with the general situation surrounding the subject-matter of the legislation than this court can possibly be. We do not, of course, intend to say that under such circumstances the judgment of the state court upon the question will be regarded as conclusive, but simply that it is entitled to the very greatest respect, and will only be interfered with, in cases of this kind, where the decision is, in our judgment, plainly wrong. In this case the Supreme Judical Court of the State holds the legislation valid, and that there is a fair reason for the discrimination between the height of buildings in the residential as compared

> with the commercial districts. That court has also held that regulations in regard to the height of buildings, and in regard to their mode of construction in cities, made by legislative enactments for the safety, comfort or convenience of the people and for the benefit of property owners generally, are valid. *Attorney-General vs. Williams,* 174 Massachusetts 476."

In Chicago, Burlington & Quincy Railway vs. Drainage Commissioners, 200 U. S. l. c. 592, Mr. Justice Harlan, in holding valid an Illinois statute providing for the drainage of certain swamp lands, passed by virtue of the police power of that state, said:

> "The learned counsel for the railway company seem to think that the adjudications relating to the police power of the State to protect the public health, the public morals and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the commuiity apart from any question of the public health, the public morals or the public safety. Hence, he presses the thought that the petition in this case does not, in words, suggest that the drainage in question has anything to do with the health of the Drainage District, but only avers that the system of drainage adopted by the Commissioners will reclaim the lands of the District and make them tillable or fit for cultivation. We cannot assent to the view expressed by counsel. We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations de-

> signed to promote the public health, the public morals or the public safety. *Lake Shore & Mich. South. Ry. vs. Ohio,* 173 U. S. 285, 292; *Gilman vs. Philadelphia,* 3 Wall. 713, 729; *Pound vs. Turck,* 95 U. S. 459, 464; *Railroad Co. vs. Husen,* 95 U. S. 470. And the validity of a police regulation, whether established directly by the State or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose."

In People vs. Wagner, 86 Mich., l. c. 599-600, it is said:

> "The State may institute any reasonable preventive remedy when the frequency of the frauds, or the difficulty experienced by individuals in circumventing them, is so great that no other means will prove efficacious."

* * * *

> "The police power of a State is not confined to regulations looking to the preservation of life, health, good order and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objections."

No one can gainsay but that the State, under its police power, has the right to prevent fraud generally, in any transaction, and especially in weights and measures of the commodities of life.

Mr. Freund, in his work on Police Power, states the rule to be:

> "The private and the criminal law, as well as the police power, undertake to afford protec-

tion against fraud. They deal, however, with fraudulent practices only by remedial relief, treating a transaction as void or setting it aside, giving a claim for damages or inflicting a penalty after the fraud has been committed. In either case, the element of fraudulent intent is essential. The police power attempts to give an ampler protection, both by adopting precautionary measures and by forbidding certain practices irrespective of an actual intent to defraud. It does not in the first instance punish fraud, but prescribes regulations and punishes their violation. The intervention of the law proceeds upon the theory that every one who invites the confidence of the public may be compelled to submit to such regulations as will guard the public as far as possible against misapprehension. Where the confidence of the public is invited to an exceptional degree, the regulations may be made specially stringent, on the ground that the business is affected with a public interest, so in banking and insurance."

* * * * *

"The earliest legislation for the prevention of fraud relates to weights and measures. It goes back to Anglo-Saxon times, and forms part of Magna Charta. The Constitution of the United States provides for uniformity of weights and measures by giving Congress power to fix their standard; but Congress has enacted no compulsory legislation in execution of this power. It merely has passed an act authorizing the use of the metric system; and the Federal government supplies the several States with certain standard weights and measures as a matter of favor and accommodation under a resolution of Congress of June 14, 1836. Until superceded by Act of Congress, the regulation of weights and measures, therefore, devolves upon the States and is provided for by State legislation."

Mr. Tiedeman, in his admirable work on police power, states the rule as to police power to prevent fraud, as follows:

> "A fraud is, of course, a trespass upon another's private rights, and can always be punished when committed. It is, therefore, but rational to suppose that the State may institute any reasonable preventive remedy when the frequency of the frauds, or the difficulty experienced in circumventing them, is so great that no other means will prove efficacious. Where, therefore, police regulations are established, which give to private parties increased facilities for detecting and preventing fraud, as a general proposition, these laws are free from all constitutional objections. Laws which provide for the inspection and grading of flour, the inspection of tobacco, the inspection and regulation of weights and measures, the regulation of weight of bread, requiring all lumber to be surveyed by a public surveyor, providing for the weighing of coal and other articles of heavy bulk on the public scales, are constitutional exercises of police power, so far as they permit one party to compel the other to comply with the regulation, in the absence of their agreement to the contrary. For example, it is permissible for a statutory regulation to provide for standard weights and measures, and to compel their use, when the parties have not agreed upon the use of others."
>
> * * * * *
>
> "The regulation is in most cases made absolute, and the observance of it is obligatory upon all. Thus it has been held that a city ordi-

nance may require hay or coal to be weighed by city weighers. Of the same character is the New York law, which provides that the sale of oleomargarine, or other products resembling butter, shall be prohibited, unless the box or other receptacle in which it is kept shall have the true name of the article plainly stamped upon it. The object of the law is the prevention of fraud and is a reasonable police regulation."

* * * * *

"In the preceding section a number of regulations, for the purpose of preventing fraud in the sale of goods, wares and merchandise, have been explained, and their constitutionality elucidated. Fraud is, of course, hydra-headed, and threatens every business relation in life. And the only constitutional question which can be raised, in respect to legislation which is designed to prevent and punish fraud in intra-State transactions, is whether the regulations go no farther than is necessary to prevent or punish the fraud, and do not infringe any vested rights, which can be enjoyed without the commission of fraud." (pp. 260-263.)

V.

PLAINTIFF IN ERROR CANNOT BE HEARD IN THIS COURT TO COMPLAIN BECAUSE JUDGE BURGESS TOOK PART IN THE DISPOSAL OF THIS CASE IN THE STATE SUPREME COURT WITHOUT HAVING HEARD THE ORAL ARGUMENT.

The complaint made here by plaintiff in error that because Judge Burgess did not hear the oral argument the State Supreme Court erred in permitting him to participate in the decision of this cause in the Court below, is without any merit and cannot be reviewed here for the following reasons:

1. Plaintiff in error fails to assign this complaint in his assignments of error filed in the State Supreme Court, and for that reason cannot be reviewed in this Court. (Rec. p. 73.)

2. In no way does this complaint involve a Federal question, the same being purely a question of State practice, and for that reason same cannot be reviewed here.

3. This complaint was made in the motion for rehearing filed by plaintiff in error in the State Supreme Court, and that Court ruled against this contention as being without any merit. (Rec. p. 70.)

VI.

THE DISSENTING OPINIONS BY JUDGES GRAVES AND FOX CONSIDERED.

While the construction given the statute under consideration, in the dissenting opinions in this cause by Judges Graves and Fox, is in no wise a factor or element in reviewing the case by this Court, and will not be followed, yet we deem it pertinent to briefly review them and point out wherein, to our mind, the error in each is very patent.

The agreed statement of facts in this case *plainly and positively* show that the 100 pounds of wheat which was taken by plaintiff in error, and for which he is prosecuted, was taken by reason of Rule 18 of the Kansas City Board of Trade, *any not by any special agreement with the owner of the carload of wheat sold.* Both of the dissenting opinions of the learned Judges have treated this case on the theory that there was a special agreement between the plaintiff in error and the owner of the carload of wheat, authorizing plaintiff in error to take the 100 pounds without paying for same. In the dissenting opinions Judges Graves and Fox fail to make a distinction between a *general agreement* for the sale of grain at the legal weights or measures, and a *special agreement* for the sale of grain by allowing the taking of the additional 100 pounds over and above the actual weight of the grain after the same had been graded and inspected.

The general Missouri statute cited by Judge Graves (Section 10576, R. S., 1899), makes the above distinction plain as to the two classes of agreements.

It provides:

> "Whenever the articles hereinafter named shall be sold by the bushel, and no special agreement as to the measurements or weights thereof shall be made by the parties, the bushel shall consist of the following number of pounds, viz.:"

Thus, the sale of a bushel of wheat under this general statute would be a *contract of sale*, yet it would be required to contain the legal number of pounds named in the statute, unless there was a "*special agrement*" providing for a greater or less number of pounds to the bushel.

Further, the learned Judges in their dissenting opinions, fail to observe the two-fold aspect of the statute under review—the one penal and the other civil.

IN CONCLUSION.

The State has discussed some questions which are not really raised in this case nor before the Court. It has done so only as a matter of precaution. There is no Federal question involved. None of plaintiff in error's rights as guaranteed to him under the fourteenth amendment to the Federal Constitution have been abridged or violated. The offense for which he is prosecuted under the statute is for deducting one hundred pounds from the actual weight of a car of grain because of rule 18 of the Kansas City Board of Trade. This one hundred pounds was not deducted by reason or virtue of any contract so to do. Under the statute to make the arbitrary reduction as plaintiff in error did constitutes a misdemeanor. He stands upon the criminal side of the statute which the Supreme Court said was two-fold in its aspect. The plaintiff in error attempts to raise questions on the civil side of the statute as to his constitutional rights to contract, etc., but that is not the case here. He is not in that class. Being without the class, under the decisions of both the State and Federal Courts, he cannot be heard upon such challenges in this case. Such questions cannot be raised in the criminal prosecution. They could only be raised in a civil action between the contracting parties. The Supreme Court has construed this statute and the construction placed upon it is conclusive and binding upon this Honorable Court.

Plaintiff in error seeks to justify the rule on the ground that the one hundred pounds deducted represented the average amount of dirt and foreign substance found in each car of grain.

In other words, if A shipped a car of grain to B free from a particle of dirt or foreign matter, one hundred pounds of grain would be deducted just the same. A loses one hundred pounds of grain for no reason, and for which he receives no compensation, the deduction being based on no less ground of right than the statement that the next shipper may ship a car containing two hundred pounds of dirt or foreign matter.

Thus one hundred pounds of grain is arbitrarily taken from the weight of the car of the man that had no dirt and the man whose car is said to have contained two hundred pounds of dirt has a deduction of one hundred pounds. Under this rule eighteen of the Kansas City Board of Trade to even the matter, A must lose one hundred pounds of grain because B, the next shipper, is supposed to have two hundred pounds of dirt in his car. This statute was enacted to prevent this arbitrary taking of property without due process of law. It is a mere device arranged to get a hundred pounds from each car of grain without giving value in return. Dirt and foreign substances are all taken into account in grading the wheat. This is a mere pretext or pretense. Fully a half million of dollars is taken annually from the producers of wheat in Missouri in this unjust way. The wrong party is complaining about his property being taken without *due process of law*. This statute is in the interest of fair dealing and common honesty. It prevents the fraudulent practices affecting weights of certain commodities. The inspection and regulation of weights and measures and all these kindred matters are within the police power of the State. It is founded on no less principle than that announced by the Proverbist when he said, "A false balance is abomination to the Lord; but a just weight is his delight."

Without further argument defendants in error respectfully submit that the judgment of the Supreme Court of Missouri in refusing to discharge plaintiff in error from the information in this case and in remanding him to the custody of Joel B. Mayes, Marshal of Jackson County, Missouri, in order that prosecution be proceeded with according to law, be affirmed.

All of which is respectfully submitted.

ELLIOTT W. MAJOR,
Attorney-General of Missouri,
JOHN M. ATKINSON,
Assistant Attorney-General of Missouri,
Attorneys and Counselors for Defendants in Error.

APPENDIX.

An Act to prevent fraud in the purchase and sale of grain and other commodities.

Be it enacted by the General Assembly of the State of Missouri, as follows

> Section 1. Every sale of grain, seed, hay or coal shall be made on the basis of the actual weight thereof, and any purchaser of grain, seed, hay or coal, who shall deduct any amount from the actual weight or measure thereof under claim of right to do so by reason of any custom or rule of a board of trade or any pretense whatsoever, shall be deemed guilty of a misdemeanor, and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each and every offense.
>
> Sec. 2. No agent or broker selling any grain, seed, hay or coal shall have authority, under claim or right to do so by reason of any custom or rule of Board of Trade, to sell any grain, seed, hay or coal only on the basis of the actual weight thereof, and any contract of sale of any grain, seed, hay or coal made in violation of this act shall be null and void.
>
> Approved June 8, 1909.
>
> (Missouri Session Acts, 1909, p. 519.)
>
> Missouri Revised Statutes, 1909, Sections, 11969, 11970.

√

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 598.

THOMAS J. BRODNAX AND FRANK E. ESSEX,
PLAINTIFFS IN ERROR,

vs.

THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED JUNE 8, 1910.

(22,219)

(22,219)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 598.

THOMAS J. BRODNAX AND FRANK E. ESSEX,
PLAINTIFFS IN ERROR,

vs.

THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

	Original.	Print
Writ of error	1	1
Return on writ of error	2½	2
Caption	3	2
Transcript from the criminal court of Jackson county, Mo	4	2
Caption	4	2
Marshals sworn	4	2
Panel of grand jurors, &c	4	3
Indictment	5	3
Marshals sworn	7	4
Judgment, &c	7	4
Bill of exceptions	9	5
Demurrer	9	6
Objections to evidence	10	6
Admitted facts	11	7
Defendant's requests for declarations of law	13	8
Motion for new trial	14	9
Motion in arrest	15	9
Affidavit for appeal	16	10
Agreed statement of facts	16	10
Judge's certificate to bill of exceptions	18	11
Clerk's certificate to transcript	18	11

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 1, 1910.

	Original.	Print
Abstract, statement, and brief for appellants (omitted in printing)..	19	—
Abstract, statement, and brief for respondent (" ")..	45	—
Amended and substituted abstract for appellants (omitted in printing)..	97	—
Order submitting cause....................(omitted in printing)..	110	—
Reply brief for appellants.................(" ")..	111	—
Judgment	128	12
Opinion by Fox, J	129	12
Order filing motion to transfer to court in banc..................	159	29
Motion to transfer to court in banc..............................	160	29
Order to transfer to court in banc...............................	160	29
Submission...	161	30
Appellants' supplemental brief............(omitted in printing)..	161	—
Judgment of court in banc..	174	30
Opinion of court in banc.........................	175	30
Order allowing writ of error..........	204	47
Writ of error (copy)...	205	48
Citation (copy)......	207	49
Petition for writ of error..........	208	49
Assignment of errors	209	50
Bond on writ of error..	211	51
Clerk's certificate to transcript................................	212	51
Assignment of errors and designation by plaintiffs in error of parts of record to be printed..	213	52
Designation by defendant in error of additional parts of record to be printed.................................	217	53

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of Missouri, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Missouri before you, or some of you, being the highest Court of Law or Equity of the said State in which a decision could be had in the said suit, wherein Thomas J. Brodnax and Frank E. Essex each was an appellant and the State of Missouri was respondent wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constit-tion, treaty, statute, or commission, a manifest error hath happened, to the great damage of each of the said appellants, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment 2 therein be given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washigton, on the 22nd day of June next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23d day of May, in the year of our Lord, nineteen hundred and ten.

Issued at office in Jefferson City, Missouri, with the seal of the Circuit Court of the United States for the Western District of Missouri, Central Division, dated as aforesaid.

[Seal of the United States Circuit Court, Central Division, for the Western District of Missouri.]

H. C. GEISBERG,
Clerk of said Circuit Court.

Allowed by me:
JAMES D. FOX,
Chief Justice of the Supreme Court of Missouri.

2½ UNITED STATES OF AMERICA,
State of Missouri, ss:

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, hereby certify that I executed the within writ by transmitting to the Clerk of the Supreme Court of the United States a full, true and complete transcript of the record in said cause.

Witness my hand as Clerk of said Court and the seal thereof hereto affixed at office in the City of Jefferson, State aforesaid, this 28th day of May, 1910.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN, *Clerk.*

[Endorsed:] No. 15738. State of Missouri, Respondent, vs. Thomas J. Brodnax, Frank E. Essex, Appellants. Writ. Filed May 23, 1910. J. D. Allen. Clerk. Frank Hagerman, Attorney at Law, Kansas City, Missouri.

3 In the Supreme Court of Missouri. Court in Banc. April Term, 1910

STATE OF MISSOURI, *sct:*

Be it remembered that heretofore, to-wit, on the 26th day of July, 1909, there was filed in the office of the clerk of the Supreme Court of the State of Missouri, a transcript in a certain cause wherein the State of Missouri was respondent and Thos. J. Brodnax and Frank E. Essex were appellants.

Which said transcript is in the words and figures as follows, to-wit:

4 STATE OF MISSOURI,
County of Jackson, ss:

Be it remembered that at a regular term of the Criminal Court of Jackson County, Missouri, begun and held at the Court House situated on the South-west corner of Missouri avenue and Oak streets in Kansas City, Missouri, on the first Monday in January, 1908, the same being the 6th day of January, 1908. There were present the Honorable William H. Wallace, Judge of said Court, Isaac B. Kimbrell, Prosecuting Attorney for said County, Al Heslip, Marshal of said County, Andy E. Thomas, Clerk of said Court and Clarence Wofford, Official Stenographer for said Court and the following proceedings were had and done by said Court, to-wit:

The oath concerning the summoning of jurors is now in open Court duly administered to Al Heslip, Marshal of Jackson County, Missouri, and to his deputies J. V. B. Martin, Melville Hulse, Martin Roos, N. B. Olsen, James Moran and Clarence Whaley.

And afterwards on the 7th day of January, 1908, the same being the 2nd day of said January Term of said Court the following proceedings were had and done by said Court, to-wit:

The Court having heretofore ordered a grand jury for the January Term 1908 of said Court the Marshal of Jackson County, Missouri, returns into open court the following panel of Grand Jurors, to-wit:

T. F. Willis, L. C. Martin, D. B. Kirk, George Peake, James H. Redding, Eli Mershon, Thomas B. Smith, Albert Marty, F. M. Ferguson, J. P. Townley, R. G. Wilson, Jr., William L. Bryant. Twelve (12) good and lawful men of the body of the County of Jackson who were duly summoned according to law and who being present in open court are duly sworn as provided by law. And the
Court appoints T. F. Willis, foreman of said Grand Jury
5 and duly charges them as to their duties, whereupon they retire to the Grand Jury room.

And afterwards on the 10th day of January, 1908, the same being the 5th day of said January Term of said Court the following proceedings were had and done by said Court, to-wit:

Now at this day comes the Grand Jury in a body into open Court and presents to the Court the following indictment, to-wit:

7249.

STATE OF MISSOURI
vs.
THOMAS J. BROADNAX and FRANK E. ESSEX.

Violation of Stamp Tax Law.

(And other indictments.

Which said indictment is in words and figures as follows, to-wit:

Indictment.

"STATE OF MISSOURI,
County of Jackson, ss:

The Grand Jurors for the County of Jackson, State of Missouri, being duly empaneled, upon their oath present and charge that at the County of Jackson, State of Missouri, on the — day of January, 1908, Thomas J. Broadnax and Frank E. Essex officers and agents of the Board of Trade of Kansas City, Missouri, a voluntary association, did then and there willfully and unlawfully keep and cause to be kept a place commonly called the trading floor of the Board of Trade of Kansas City, wherein was then and there permitted the buying and selling of grain, provisions and other commodities, on margins and otherwise, and where at the time of such sales, so permitted as aforesaid, the grain, provisions and other commodities, so sold as aforesaid, were not then and there actually paid for and delivered, and at such time and place the sellers, or any of them, whose names are to the Grand Jury unknown, of the grain, provisions and other commodities, so sold on margins and otherwise, as aforesaid, did not then and there cause to be made a complete record of the grain, provisions and other commodities, sold the purchasers and the time of delivery in a book kept for that purpose, and at said time and place the sellers, or any of them, whose names are to the Grand Jury unknown, did not then and there deliver to the purchasers of said grain, provisions and other commodities, so sold as aforesaid, a written or printed memoranda of said sales, on which they, the said sellers, or any of them, had placed or caused to be placed a stamp of the value of twenty-five cents, which they, the sellers, had purchased of the State Auditor and had on hand before making such sales; contrary to the Statutes in such case made and provided and against the peace and dignity of the State.

ISAAC B. KIMBRELL,
Prosecuting Attorney."

6 On the reversed side of which said Indictment was duly endorsed as follows, to-wit:

7249. Indictment. State of Missouri vs. Thomas J. Broadnax and Frank E. Essex. Charged with Violation of Stamp Tax Law. A True Bill. T. F. Willis, Foreman. Filed January 10th, 1908. Andy E. Thomas, Clerk. By Edwin Turner, D. C. Witness: E. D. Bigelow.

STATE OF MISSOURI,
County of Jackson, ss:

Be it remembered that at a regular term of the Criminal Court of Jackson County, Missouri, begun and held at the Court-house situated on the South-west corner Missouri avenue and Oak streets in Kansas City, Missouri, on the first Monday in April 1909 the same being the 5th-day of April, 1909. There were present the Honorable Ralph S. Latshaw, Judge of said Court, Virgil Conkling,
7 Prosecuting Attorney of said County, Joel B. Mayes, Marshal of said County, Andy E. Thomas, Clerk of said Court and Clarence Wofford, Official stenographer of said Court and the following proceedings were had and done by said Court, to-wit:

The oath concerning the summoning of jurors is now in open Court duly administered to Joel B. Mayes, Marshal of Jackson County, Missouri, and to his deputies, Henry Tralle, Cornelius Gorman, T. G. Holloway, W. B. Montgomery and Herman Cook.

And afterwards on the 15th day of July, 1909, the same being the 63rd day of said April Term of said court the following proceedings were had and done by said Court, to-wit:

7249.

STATE OF MISSOURI
vs.
THOMAS J. BROADNAX and FRANK E. ESSEX.

Violation Stamp Law.

Now comes the Prosecuting Attorney comes also the defendants herein each in person and by attorney and said defendants being arraigned before the Court for plea of each for himself says he is not guilty in manner and form as charged in the indictment herein. Thereupon said defendants file demurrer to the indictment herein which said demurrer being now taken up, argued and submitted to the Court is by the Court overruled, to which said ruling of court defendants then and there excepts. Thereupon parties announce ready for trial herein and waive all right for a trial by jury herein and submit this cause to the Court upon an agreed statement of facts and the Court after hearing the arguments of counsel herein and being fully advised in the premises finds the defendants guilty and assess the punishment of each at a fine of Fifty ($50.00) Dollars.

Thereupon said defendants file motion for new trial herein which said motion being submitted to the Court is by the Court overruled.

8 Thereupon said defendants file motion in arrest of judgment herein, which said motion in arrest of judgment being submitted to the Court is by the Court overruled, to all of which said rulings of said Court defendants then and there except.

It is therefore considered and adjudged by the Court that the State of Missouri have and recover of and from said defendant Thomas J. Broadnax the sum of Fifty ($50.00) dollars as a fine for said offense as well as all costs herein and that execution issue therefor with Capais Clause attached thereto.

It is therefore considered and adjudged by the Court that the State of Missouri have and recover of and from said defendant Frank E. Essex the sum of Fifty ($50.00) dollars as a fine for said offense as well as the costs herein and that execution issue therefor with Capias Clause attached thereto.

Thereupon said defendants file affidavit in appeal herein which said appeal is by the Court allowed to the Supreme Court of the State of Missouri. Thereupon said defendants present to the Court here their bill of exceptions herein which said bill of exceptions is by the Court signed, sealed, allowed and ordered to be filed and made a part of the record herein which is accordingly done.

9 In the Criminal Court of Jackson County, Missouri.

STATE OF MISSOURI
v.
THOMAS J. BRODNAX and FRANK E. ESSEX.

Bill of Exceptions.

Be it remembered:

The matter of the indictment of Thomas J. Brodnax and Frank E. Essex coming on for hearing this 15th day of July, 1909, the same being the sixty-third day of the April, 1909, term, the defendants appear and file their demurrer, which omitting caption, is in words and figures following:

'*Demurrer.*

"Come now defendants, Thomas J. Brodnax and Frank E. Essex and demur to the indictment herein returned and as grounds therefor say that said indictment does not state facts which constitute an offense against the State of Missouri, and that the Statute, the violation of which is alleged in said indictment, is null and void, being in violation of Sections 20 and 30 of Article II, of Sections 28 and 53, of Article IV; and of Sections 3 and 4 of Article X, of the Constitution of the State of Missouri; and of the Interstate Commerce provisions of Section 8, of Article I, and of the Fourteenth Amendment to the Constitution of the United States.

FRANK HAGERMAN,
R. F. WALKER,
KIMBROUGH STONE,
Attorneys for Defendants.'

Which being considered by the court was overruled.

To which ruling defendants then and there excepted.

10 By consent of all parties a jury is waived and the cause comes on for trial.

Before the introduction of any evidence the defendants object to the introduction of any evidence on the following grounds, to-wit:

"1. The statute under which this proceeding is instituted is discriminatory, abridges the privileges and immunities of citizens of the United States, deprives defendants of their property without due process of law, and denies to them the equal protection of the law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

2. The statute under which the proceeding is instituted is an unwarranted attempt to regulate interstate commerce and is violative of section 8, article 1, of the constitution of the United States.

3. The statute under which the proceeding is instituted is invalid as a tax not levied in proportion to value, in violation of section 4, of article X, constitution of Missouri.

4. The statute under which the proceeding is instituted is invalid as providing for a tax which is not uniform upon the same class of subjects, in violation of section 3, of article X, constitution of Missouri.

5. The statute under which the proceeding is instituted is void, being a special law, in violation of sec. 53, of article IV, constitution of Missouri.

6. The statute under which the proceeding is instituted is void, being passed in a bill which contained more than one subject, which were not clearly expressed in the title thereof, in violation of section 28, of article IV, of the constitution of Missouri.

7. The statute under which the proceeding is instituted is void as depriving defendants of property without due process of law, in violation of section 30 of article II, constitution of Missouri.

8. The statute under which the proceeding is instituted is void

as taking private property for private use without compensation, in violation of section 20, of article II, constitution of Missouri."

Which objection is by the court overruled.

To which ruling defendants then and there excepted.

Whereupon, for the purposes of this case and subject to the objections hereinafter stated, the facts are admitted to be as follows:

11 "The defendants are citizens of the United States and of Jackson County, Missouri. The title of the act under which the indictment was found is, 'An Act making it unlawful for any corporation, co-partnership or person to buy or sell, for future delivery, stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, without at the time delivering or receiving a written memoranda with a stamp purchased of the state auditor, and to provide a road fund, and to prescribe the manner of its distribution; and providing penalties for the violation thereof.' That Thomas J. Brodnax and Frank E. Essex, of Jackson County, Missouri, defendants herein, on the — day of January, 1908, as members, officers and agents of the Board of Trade of Kansas City, Missouri, a voluntary association, did keep and cause to be kept a place commonly known and called 'a trading floor' of the Board of Trade of Kansas City, Missouri, wherein was permitted the buying and selling of grain, provisions and other commodities on margins and otherwise, and where, at the time of such sales so permitted as aforesaid, the grain, provisions and other commodities, so sold as aforesaid, were not actually paid for and delivered, and at the time and place of such sales the sellers or any of them, of the grain provisions and other commodities as aforesaid, so sold on margins and otherwise, did not deliver to the purchasers of said grain, pro-
12 visions and other commodities so sold as aforesaid, written or printed memoranda of said sales on which they (the sellers) or any of them had placed or caused to be placed a stamp of the value of twenty-five cents which they (the sellers) had purchased of the State Auditor of the State of Missouri and had on hand before the making of such sale or sales."

To all of the above facts the defendants object as incompetent, irrelevant and immaterial and because the statute the violation of which is alleged in the indictment herein filed is null and void, being in violation of Sections 20 and 30, of Article II, Sections 28 and 53 of Article IV, Sections 3 and 4 of Article X, of the Constitution of the State of Missouri, and the interstate commerce provisions of Section 8 of Article 1, and of the Fourteenth Amendment to the Constitution of the United States, which objections are by the court overruled.

To which ruling defendants then and there excepted.

"A substantial part of the sales aforesaid being of grain, provisions and other commodities which were at the time of sale in course of transportation as articles of interestate commerce."

To the facts immediately preceding the state objects as incompetent, irrelevant and immaterial, which objection is by the court overruled.

To which ruling the state then and there excepted.

At the conclusion of the evidence, the defendants asked declarations of law as follows:

13 I.

Under the facts and the pleadings the defendants must be acquitted.

II.

The statute under which this proceeding is instituted is discriminatory, abridges the privileges and immunities of citizens of the United States, deprives defendants of their property without due process of law, and denies to them the equal protection of the law contrary to the provisions of the fourteenth amendment of the Constitution of the United States.

III.

The statute under which the proceeding is instituted is an unwarranted attempt to regulate interstate commerce and is violative of Section 8, Article I, of the Constitution of the United States.

IV.

The statute under which the proceeding is instituted is invalid as a tax not levied in proportion to value, in violation of Section 4, of Article X, Constitution of Missouri.

V.

The statute under which the proceeding is instituted is invalid as providing for a tax which is not uniform upon the same class of subjects, in violation of Section 3, of Article X, Constitution of Missouri.

VI.

The statute under which the proceeding is instituted is void being a special law, in violation of Section 53 of Article IV, Constitution of Missouri.

VII.

The statute under which the proceeding is instituted is void being passed in a bill which contained more than one subject and which subjects were not clearly expressed in the title thereof, in violation of Section 28, Article IV, of the Constitution of Missouri.

14 VIII.

The statute under which the proceeding is instituted is void as depriving defendants of property without due process of law, in violation of Section 30, of Article II, Constitution of Missouri.

IX.

The statute under which the proceeding is instituted is void as taking private property for private use without compensation, in violation of Section 20, of Article II, Constitution of Missouri.

Which declarations of law are each and all by the court denied.

To which rulings defendants then and there excepted, each and all of —.

The cause being submitted, the court finds the defendants guilty as alleged in the indictment and assesses their punishment at a fine of Fifty dollars each and sentences them to pay a fine of Fifty Dollars each.

Whereupon on said 15th day of July, 1909, and within four days after rendition of judgment herein and during said April, 1909, Term, defendants file their motions for new trial and in arrest, in words and figures following:

In the Criminal Court of Jackson County, Missouri.

STATE OF MISSOURI
v.
THOMAS J. BRODNAX and FRANK E. ESSEX.

Motion for New Trial.

Come now the defendants and pray the court to grant them a new trial and as grounds therefor state:

15 1. Because the court erred in admitting evidence over the objection of the defendants.

2. Because the court erred in denying the declarations of law and each of them asked by defendants, all of which requested declarations were upon points material to the case.

3. Because the verdict is contrary to the law and the evidence.

FRANK HAGERMAN,
R. F. WALKER,
KIMBROUGH STONE,
Attorneys for Defendants.

In the Criminal Court of Jackson County, Missouri.

STATE OF MISSOURI
v.
THOMAS J. BRODNAX and FRANK E. ESSEX, Defendants.

Motion in Arrest.

Come now the defendants and pray the court to arrest judgment herein and as grounds therefor state:

1. That the facts alleged in the indictment herein do not constitute a public offense.

2. That the finding of the court upon the facts is insufficient to sustain the judgment.

3. That there is error apparent on the face of the record.

FRANK HAGERMAN,
R. F. WALKER,
KIMBROUGH STONE,
Attorneys for Defendants.

Which motions for a new trial and in arrest being presented and submitted are by the court duly considered and overruled.

To each of which rulings defendants then and there excepted.

16 Whereupon, upon said 15th day of July, 1909, and at the said April, 1909, Term of said court, the defendants file their affidavit for appeal to the Supreme Court of the State of Missouri, in words and figures following:

In the Criminal Court of Jackson County, Missouri.

STATE OF MISSOURI
v.
THOMAS J. BRODNAX and FRANK E. ESSEX.

Affidavit for Appeal.

STATE OF MISSOURI,
County of Jackson, ss:

Come now defendants Thomas J. Brodnax and Frank E. Essex who being duly sworn upon their oath state that they deem themselves aggrieved by the finding of the court herein and the sentence herein rendered and pray an appeal to the Supreme Court of the State of Missouri, and state that they will appear in the Criminal Court of Jackson County, Missouri, at such time and place as the Supreme Court shall direct and render themselves in execution and obey every order and judgment which shall be made in the premises.

THOMAS J. BRODNAX.
FRANK E. ESSEX.

Subscribed and sworn to before me this 12th day of July, 1909. My commission expires Jan. 9, 1913.

[SEAL.] EDMUND D. BIGELOW,
Notary Public, Jackson County, Mo.

Which affidavit being presented to and considered by the court is deemed sufficient and an appeal allowed defendants to the Supreme Court of the State of Missouri.

Agreed Statement.

For the purposes of this case and subject to the objections hereinafter stated, the facts are admitted to be as follows:

17 "The defendants are citizens of the United States and of Jackson County, Missouri. The title of the act under which the indictment was found is, 'An Act making it unlawful for any corporation, co-partnership or person to buy or sell, for future delivery, stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, without at the time deliver-

ing or receiving a written memoranda with a stamp purchased of the state auditor, and to provide a road fund, and to prescribe the manner of its distribution; and providing penalties for the violation thereof.' That Thomas J. Brodnax and Frank E. Essex, of Jackson County, Missouri, defendants herein on the — day of January, 1908, as members, officers and agents of the Board of Trade of Kansas City, Missouri, a voluntary association did keep and cause to be kept a place commonly known and called 'the trading floor' of the Board of Trade of Kansas City, Missouri, wherein was permitted the buying and selling of grain, provisions and other commodities on margins and otherwise, and where at the time of such sales so permitted as aforesaid, the grain, provisions and other commodities, so sold as aforesaid, were not actually paid for and delivered, and at the time and place of such sales the sellers or any of them, of the grain, provisions and other commodities as aforesaid, so sold on margins and otherwise, did not deliver to the purchasers of said grain, provisions and other commodities so sold as aforesaid, written or printed memoranda of said sales on which they (the sellers) or any of them had placed or caused to be placed a stamp of the value of twenty-five cents which they (the sellers) had purchased of the state auditor of the State of Missouri and had on hand before the making of such sale and sales."

To all of the above facts the defendants object as incompetent, irrelevant and immaterial and because the statute the violation of which is alleged in the indictment herein filed, is null and void, being in violation of Sections 20 and 30, of Article II, Section- 28 and 53 of Article IV, Sections 3 and 4 of Article X, of the
18–127 Constitution of the State of Missouri, and the interstate commerce provisions of Section 8 of Article I, and of the Fourteenth Amendment to the Constitution of the United States.

Which objections are by the court overruled.

To which action defendants duly excepted.

"A substantial part of the sales aforesaid being of grain, provisions and other commodities which were at the time of sale in course of transportation as articles of interstate commerce."

To evidence establishing the facts immediately preceding the state objects, as incompetent, irrelevant and immaterial which objection is by the court overruled.

Now comes the defendant upon this the 15th day of July, 1909, and during the same term of said court aforesaid, and presents this his bill of exceptions and asks that the same be allowed and signed and made a part of the record in this cause.

Which is accordingly done this the 15th day of July, 1909.

RALPH S. LATSHAW,
Judge of the Criminal Court of Jackson County, Missouri.

STATE OF MISSOURI,
County of Jackson, ss:

I, Andy E. Thomas, Clerk of the Criminal Court of Jackson County, Missouri, do hereby certify the foregoing to be a full, true and complete transcript of the bill of exceptions, record and proceedings of Court in the case wherein the State of Missouri is plaintiff and Thomas J. Broadnax and Frank E. Essex are defendants as the same appears of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said Court at office in Kansas City, Missouri, this 24th day of July, 1909.

[SEAL.] ANDY E. THOMAS,
Clerk of the Criminal Court of Jackson County, Missouri.

* * * * * * *

128 And thereafter, to-wit, on the 15th day of March, 1910, the Court made and entered of record the following:

STATE OF MISSOURI, Respondent,
vs.
THOMAS J. BRODNAX and FRANK E. ESSEX, Appellants.

Appeal from Jackson County Criminal Court.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Jackson County Criminal Court rendered, be in all things affirmed, and stand in full force and effect, and that the said respondent recover against the said appellants its costs and charges herein expended, and have therefor execution (opinion filed).

Which said opinion is in words and figures as follows:

129 In the Supreme Court of Missouri, Division No. 2.

Oct. Term, 1909; (January Call, 1910).

No. 15738.

STATE OF MISSOURI, Respondent,
v.
THOMAS J. BRODNAX and FRANK E. ESSEX, Appellants.

This is a prosecution of the defendants begun in the criminal court of Jackson county, Missouri, for a violation of an act of the legislature passed in 1907, and commonly known as the "Stamp Act." This act was approved March 8, 1907.

The indictment upon which the judgment in this cause rests, omitting formal parts, is as follows:

"The Grand Jurors for the county of Jackson, state of Missouri, being duly empaneled, upon their oath present and charge that at the county of Jackson, state of Missouri, on the — day of
130 January, 1908, Thomas J. Brodnax and Frank E. Essex, officers and agents of the Board of Trade of Kansas City, Mis-

souri, a voluntary association, did then and there willfully and unlawfully keep and cause to be kept a place commonly called the trading floor of the Board of Trade of Kansas City, wherein was then and there permitted the buying and selling of grain, provisions and other commodities, on margins and otherwise, and where at the time of such sales, so permitted as aforesaid, the grain, provisions and other commodities, so sold as aforesaid, were not then and there actually paid for and delivered, and at such time and place the sellers, or any of them, whose names are to the Grand Jury unknown, of the grain, provisions and other commodities, so sold on margins and otherwise, as aforesaid, did not then and there cause to be made a complete record of the grain, provisions and other commodities, sold the purchasers and the time of delivery in a book kept for that purpose, and at said time and place the sellers, or any of them, whose names are to the Grand Jury unknown, did not then and there deliver to the purchasers of said grain, provisions and other commodities, so sold as aforesaid, a written or printed memoranda of said sales, on which they, the said sellers, or any of them, had placed or caused to be placed a stamp of the value of twenty-five cents, which they, the sellers, had purchased of the state auditor and had on hand before making such sales; contrary to the statutes in such case made and provided, and against the peace and dignity of the State."

To this indictment the defendants interposed a demurrer in which the constitutionality of the act upon which the indictment is predicated is challenged. Such demurrer, in substance, alleged that said indictment does not state facts which constitute an offense against the state of Missouri, and that the statute, the violation of which is
alleged in said indictment, is null and void, being in violation
131 of sections 20 and 30 of article II, and sections 28 and 53 of
article IV, and of sections 3 and 4 of article X of the constitution of the state of Missouri, and of the Interstate Commerce provisions of section 8 of article I, and of the Fourteenth Amendment to the Constitution of the United States.

The defendants were duly arraigned and entered each himself a plea of not guilty.

By consent of the parties to this proceeding a jury was waived and the cause was submitted to the court for trial. Before the introduction of any evidence defendants objected to the introduction of any evidence on the following grounds, to-wit:

"1. The statute under which this proceeding is instituted is discriminatory, abridges the privileges and immunities of citizens of the United States, deprives defendants of their property without due process of law, and denies to them the equal protection of the law contrary to the provisions of the Fourteenth Amendment of the constitution of the United States.

2. The statute under which the proceeding is instituted is an unwarranted attempt to regulate interstate commerce and is violative of section 8, article I, of the constitution of the United States.

3. The statute under which this proceeding is instituted is invalid as a tax not levied in proportion to value, in violation of section 4, of article X, constitution of Missouri.

4. The statute under which the proceeding is instituted is invalid as providing for a tax which is not uniform upon the same class of subjects, in violation of section 3, of article X, constitution of Missouri.

5. The statute under which the proceeding is instituted is void, being a special law, in violation of section 53, of article IV, constitution of Missouri.

6. The statute under which the proceeding is instituted is void,
being passed in a bill which contained more than one subject,
132 and which subjects were not clearly expressed in the title
thereof, in violation of section 28, of article IV of the constitution of Missouri.

7. The statute under which the proceeding is instituted is void as depriving defendants of property without due process of law, in violation of section 30 of article II, constitution of Missouri.

8. The statute under which the proceeding is instituted is void as taking private property for private use without compensation, in violation of section 20 of article II, constitution of Missouri."

The objections thus made were by the court overruled, the defendants properly preserving their exceptions to the action of the court in overruling such objections. The cause was then submitted to the court upon the following agreed statement of facts, subject to the objections as herein indicated. The agreed facts were as follows:

"The defendants are citizens of the United States and of Jackson county, Missouri. The title of the act under which the indictment was found is, 'An act making it unlawful for any corporation, copartnership or person to buy or sell, for future delivery, stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, without at the time delivering or receiving a written memoranda with a stamp purchased of the state auditor, and to provide a road fund, and to prescribe the manner of its distribution; and providing penalties for the violation thereof.' That Thomas J. Brodnax and Frank E. Essex, of Jackson county, Missouri, defendants herein, on the — day of January, 1908, as members, officers and agents of the Board of Trade of Kansas City, Missouri, a voluntary association, did keep and cause to be kept a place commonly known and called 'a trading floor' of the Board of Trade of Kansas City, Missouri, wherein was permitted the buying and
selling of grain, provisions and other commodities on mar-
133 gins and otherwise and where, at the time of such sales so
permitted as aforesaid, the grain, provisions and other commodities so sold, as aforesaid, were not actually paid for and delivered, and at the time and place of such sales the sellers or any of them, of the grain, provisions and other commodities as aforesaid, so sold on margins and otherwise, did not deliver to the purchasers of said grain, provisions and other commodities so sold as aforesaid, written or printed memoranda of said sales on which they (the sellers) or any of them had placed or caused to be placed a stamp of the value of twenty-five cents which they (the sellers) had pur-

chased of the state auditor of the state of Missouri and had on hand before the making of such sales.'

To all of the above facts the defendants object as incompetent, irrelevant and immaterial and because the statute the violation of which is alleged in the indictment herein filed is null and void, being in violation of sections 20 and 30, of article II, sections 28 and 53 of article IV, sections 3 and 4 of article X, of the constitution of the state of Missouri, and the interstate commerce provisions of section 8 of article 1, and of the Fourteenth Amendment to the constitution of the United States, which objections are by the court overruled.

To which ruling the defendants then and there excepted.

'A substantial part of the sale aforesaid being of grain, provisions and other commodities which were at the time of sale in course of transportation as articles of interstate commerce.'

To the facts immediately preceding the state objects as incompetent, irrelevant and immaterial, which objection is by the court overruled."

At the conclusion of the evidence the defendants requested the court to give numerous declarations of law. We deem it unnecessary to reproduce in the statement the declarations of law so requested. It is sufficient to say that they were along the lines 134 of the grounds alleged in the demurrer and the objections urged to the introduction of any evidence as the commencement of the trial. All of the declarations of law, as requested, were by the court refused, to which action of the court in refusing such declarations the defendants duly preserved their exceptions. The cause was then submitted to the court and the defendants were found guilty as charged in the indictment, and their punishment assessed at a fine of fifty dollars each.

Timely motions for new trial and in arrest of judgment were filed, and by the court taken up and overruled. Judgment was entered in accordance with the finding of the court, and from this judgment defendants, in due time and proper form, prosecuted this appeal, and the record is now before us for consideration.

Opinion.

The record before us discloses that the defendants were convicted in the criminal court of Jackson county, Missouri, upon an indictment by the grand jury of said county charging them with a violation of an act of the General Assembly of Missouri passed in 1907, and approved March 8th of that year. The act upon which the indictment in this cause and the judgment of conviction must rest, was as follows:

"An act making it unlawful for any corporation, co-partnership or person to buy or sell, for future delivery, stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other 135 commodities, without at the time of delivering or receiving a written memoranda with a stamp purchased of the state auditor and to provide a road fund, and to prescribe the manner of its distribution; and providing penalties for the violation thereof.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. It shall be unlawful for any corporation, association, co-partnership or person to keep, or cause to be kept, in this State, any office, store or other place wherein is permitted the buying or selling the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, either on margins or otherwise, where the same is not at the time actually paid for and delivered, without at the time of the sale the seller shall cause to be made a complete record of the thing sold, the purchaser and the time of delivery in a book kept for that purpose; and at the same time the seller shall deliver to the purchaser a written or printed memoranda of said sale, on which he shall place, or cause to be placed, a stamp of the value of twenty-five cents, which the seller shall purchase of the state auditor, and have on hand before making such sale; and it shall be the duty of the state auditor, upon the passage of this act, to have printed or engraved stamps for this purpose, of such design as he may select; and on application any payment for said stamps, to immediately furnish the same to the applicants applying therefor: Provided, further, that it shall be unlawful for the purchaser to receive the memoranda aforesaid until it bears the stamp above provided for.

SEC. 2. The fund arising from the sale of the stamps provided for in section one of this act shall, in the hands of the state auditor, constitute a road fund; and it shall be the duty of the said auditor to distribute said fund, annually, to the counties in the State and the City of St. Louis, in the same proportions and in like manner as the State school funds are now distributed by him.

SEC. 3. Any person, whether acting individually or as a
136 member, or as an officer, agent or employe of any corporation, association or co-partnership, who shall be guilty of violating any of the provisions of section one, shall, upon conviction thereof, be fined in any sum not less than fifty, nor more than one thousand dollars, and in addition thereto may be imprisoned in the county or city jail for a period of not less than thirty days, not to exceed one year.

Approved March 8, 1907."

The validity of this statute is challenged by learned counsel for appellants upon numerous grounds, which may thus be briefly stated:

First. It is insisted that the statute is purely a revenue measure.

Second. That the tax provided by the statute is not uniform, and hence is violative of the fourteenth amendment of the constitution of the United States, as well as sections 3 and 4 of article 10, and section 53 of article 4, and section 30 of article 2 of the constitution of Missouri.

Third. It is earnestly contended that the statute is an interference with the interstate commerce; hence, is violative of section 1 of article 8 of the constitution of the United States.

These are the propositions confronting us and their solution must be sought by a fair and reasonable application of the rules of law applicable to the questions presented. We will treat the propositions in the order as herein indicated.

137 I.

Directing our attention to the insistence of counsel for appellant that this act is a revenue measure and its validity must be tested by the taxing power, it is sufficient to say, in our opinion, that the test of the validity of this act is not to be applied to the usual taxing power in the imposition of a direct or property tax in any of the forms in which they are ordinarily imposed. Manifestly the act does not provide a direct or property tax in any form whatever, but simply provides for an excise or stamp tax on the right, privilege and occupation of buying or selling shares of stocks, or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, either on margins or otherwise, where the same is not at the time actually paid for and delivered. As was said in Nicol v. Ames, 173 U. S., 509, where a tax of this character was in judgment before that court, that the tax is in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted, but is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. It is not a tax upon the members of the exchange nor upon the membership therein, nor is it a tax upon sales generally. The act limits the tax to sales at any exchange or board of trade, or other similar place, and its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise."

138 So it may be said of this act, that it has no application to sales generally, but it is directed to any corporation, association, co-partnership or person that keeps or causes to be kept in this state any office, store or other place for the purpose of transacting certain forms of commercial dealings, that is to say, wherein the buying or selling is permitted of shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, on margins or otherwise, where the same is not at the time actually paid for and delivered. In other words, by the act it is sought to regulate the place of business as designated in the statute where stocks, bonds, etc., are bought and sold on margins or otherwise, where the same is not at the time actually paid for and delivered, by requiring, in the transaction of business of that character, that a complete record of the things sold, the name of the purchaser and the time of delivery in a book kept for that purpose, with the further requirement that the seller shall deliver to the purchaser a written or printed memoranda of such sale, on which he shall place, or cause to be placed, a stamp of the value of twenty-five cents.

This act has no application to the ordinary and usual business transactions, such as might be conducted by a merchant or butcher

who are engaged in the business of selling goods, wares, merchandise and provisions, and who may sell such goods, wares, merchandise and provisions upon credit, but is directed to a class of
139 business which has made marked advancements along the lines of commercial transactions, particularly in the large cities and towns of this country. It has application to corporations, associations, co-partnerships or persons that may keep and furnish meeting places for those engaged in the purchase or sale of commodities or other things to be sold upon margins or otherwise, and to sales made in such places without at the time any payment being made for the article purchased or any delivery of such article. This act embraces every character of association, whether they be corporations or voluntary associations, or whether they be called boards of exchange or boards of trade, as well as embracing partnerships and individuals who may keep and furnish places of the character designated by this act.

Dealings of the character and the places furnished for such dealings which are sought to be regulated by the imposition of certain conditions and a stamp tax upon sales that are made, are not subjects which are unknown, either to the people or to the legislative bodies that may in a legislative way deem it essential to give them consideration. They are places where important transactions occur; in fact it is at such places that frequently the prices of commodities are fixed, and an enormous amount of business of the country is transacted and takes place upon boards of trade or exchange and other places of similar character.

In Nicol v. Ames, supra, it was fully recognized that dealings in the places of the character designated by the act were subjects
140 of such importance as to demand the consideration and attention of even the taxing power of the government. It was said in that case that the places of the character treated of in the act now under consideration "furnish a meeting place for those engaged in the purchase and sale of commodities or other things to be sold, and in that way they offer facilities for a market for them. Dealings among members so engaged tend to establish the market price of the articles they deal in, and that price is very apt to be the price for the same article when bought or sold outside. The price is arrived at by offers to sell on the one side and to purchase on the other until, by what has frequently been termed, the 'higgling' of the market, a price is agreed upon and the sales are accomplished. In arriving at this price, of course the great law of the cost of production and also that of supply and demand enter into the problem, and it is upon a consideration of all matters regarded as material that the agreement to buy and sell is made. The prices thus fixed are usually followed when the transaction occurs outside, and the market price means really the exchange price. That an enormous amount of the business of the country which is engaged in the distribution of the commodities grown or produced therein is transacted and takes place through the medium of boards of trade or exchanges cannot be doubted. Nor is there any doubt that these exchanges facilitate transactions of purchase and sale, and it would seem that such facili-

ties or privileges, even though not granted by the government or by a state, ought nevertheless to be recognized as existing facts and to be subject to the judgment of Congress as fit for matters for taxation."

Manifestly if the authority of the taxing power may be invoked and certain taxes imposed upon the dealings and transactions now under consideration, for a much stronger reason the power to regulate and impose a license or stamp tax by the state government should not be seriously questioned under the constitution and laws of this state. 141 The provisions of this act simply impose certain conditions upon the transactions in the places furnished and designated by the statute, that is to say, it imposes a license or stamp tax, which is fully set forth in the statute, and while this tax may furnish a revenue, it falls far short of being a purely revenue measure by the exercise of the taxing power of the state in the imposition of a direct tax upon property or values of property.

In the constitution of the state of California there was a provision absolutely prohibiting sales or margins, and this provision was upheld by the supreme court of the United States in Otis v. Parker, 187 U. S., loc. cit., 109-10. The court in discussing the provision, said:

"We cannot say that there might not be conditions of public delirium in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion. Of course, if a man can buy on margin he can launch into a much more extended venture than where he must pay the whole price at once. If he pays the whole price he gets the purchased article, whatever its worth may turn out to be. But if he buys stocks on margins he may put all his property into the venture, and being unable to keep his margins good if the stock market goes down, a slight fall leaves him penniless, with nothing to represent his outlay."

So it may be said of the act now under consideration. There is no impropriety (the regulations not being unreasonable), in regulating the dealings at the places to which the statute refers. 142 It simply provides for a record being kept of all the sales and purchases, the names of the sellers and purchasers and then emphasizes it with the requirement that a memoranda of the sale must be given to the purchaser by the seller, duly stamped with a stamp of the character provided for by the statute.

There are many good reasons for the regulation of business transactions of the character with which we are dealing, and they are so well known to the business public that we will not burden this opinion by enumerating the many good results that will flow from a strict regulation of the transaction of business of the class and character of which the statute now under consideration treats. It is sufficient to direct attention to the case of Otis v. Parker, supra, wherein the supreme court of the United States clearly indicated the dangers to which dealing in margins and futures might lead.

We shall not pursue this subject further. We are unable to give our assent to learned counsel's first contention that this is a revenue measure and that its validity must be tested by the constitution and laws applicable to the taxing power in the imposition of taxes directly upon property or the value of property.

II.

We are next confronted with the proposition insisted upon by counsel for appellants that the tax is not uniform. It is urged that this tax is not directed and imposed upon the same class of 143 subjects within the territorial limits of the authorities levying the tax, and that the classification of subjects is not a true classification. In other words, that the classification of subjects for taxation is unreasonable. It is also insisted that the tax discriminates between members of the class affected thereby.

For these reasons the provisions of the statute now under consideration, which provide for a license or stamp tax upon the dealings and transactions in the places designated in the statute are assailed as being violative of the due process of law and equal protection of the laws, provided for in the fourteenth amendment of the constitution of the United States, as well as section 30, article 2, and section 53, article 4 and section 3, article 10 of the state constitution.

It is sufficient to say upon this proposition that we pointed out in the first paragraph of this opinion the class of persons to whom this law is directed, and the character of dealings and transactions to which the law was made applicable. In our opinion, this law clearly embraces every class, whether it be corporation, association, either voluntary or otherwise, partnership or person which furnishes a place for dealing in sales of stocks, bonds, etc., upon margins or otherwise, where the same is not at the time actually paid for and delivered, and embraces all classes who may deal in such places so furnished.

It is clear that the character of business which is treated of by the statute is fully recognized as a separate and distinct business 144 from all other classes. That the statute embraces every class, whether it be corporation, association, partnership or person who may furnish a place or may deal in transactions in such places, there can be, in our opinion, no sort of doubt; therefore we conclude that so far as the class of persons to whom this law is made applicable, whether natural or artificial, this statute embraces the entire class and is not subject to the objection that it singles out a part of a legal class upon which the license or stamp tax is imposed and exempts others of the same class. Manifestly the selection of the business calling and the class pursuing such calling were proper and appropriately selected by the legislature of this state in dealing with that subject.

It is next insisted that the attempted classification of transactions is arbitrary. This same objection, (and it was earnestly insisted upon,) to the classification of subjects for taxation, was in judgment in *People ex rel. Hatch* v. *Reardon*, 184 N. Y., l. c., 442. In that case the subject was exhaustively treated and the authorities applicable to it were all carefully reviewed and the rulings of the court upon substantially the same propositions involved in the case at bar, were adverse to the contentions of learned counsel for appellants. It was insisted in the New York case that the classification made by selecting one kind of property and taxing the transfer of that only, was so arbitrary, discriminating and unreasonable as to deprive certain persons of their property without due process of law and to withhold from them the equal protection of the laws. It was 145 said by the court in that case that all taxation is arbitrary, for the reason that it compels the citizen to give up a part of his property. It was also said that it is generally discriminating, for otherwise everything would be taxed, which has never yet been done, and there would be no exemption on account of education, charity or religion, and frequently it is unreasonable, but that does not make it unconstitutional, even if the result is double taxation. Further discussing this proposition the New York court used this language:

"A tax may be imposed only on certain callings and trades, for when the state exerts its power to tax it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if the state could not tax any property or calling unless at the same time it taxed all property or all callings. (citing Connolly v. Union Sewer Pipe Co., 184 U. S., 540, 562; Armour Packing Co. v. Lacey, 200 U. S., 226, 235).

"The legislature must decide when and how and for what public purposes a tax shall be levied, and must select the subjects of taxation." 1 Cooley on Taxation, (3rd Ed.) 255.

The Hatch case by the New York court, very clearly, and in our opinion, correctly announced this rule, that:

"The legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon others, the remedy for injudicious action being in the hands of the people, not of the courts. Arbitrary selection and discrimination characterize the history of legislation, both state and national, with reference to taxation, yet when all persons and property in 146 the same class are treated alike, it has uniformly been sustained both by the state and federal courts. '* * * The power of taxation necessarily involves the right of selection, which is without limitation, provided all persons in the same situation are treated alike and the tax imposed equally upon all property of the class to which it belongs.' (Matter of McPherson, 104 N. Y., 306, 318; Matter of Gould, 156 N. Y., 423, 427.) The equal protection of the laws 'only requires the same means and methods to be applied impartially to all the constituents of each class, so that the laws shall operate equally and uniformly upon all persons in similar circumstances. (Kentucky R. R. Cases, 115 U. S., 321, 337.) Or, in other words, all persons must 'be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' Magoun v. Illinois Trust and Savings Bank, 170 U. S., 283, 293; Hayes v. Missouri, 120 U. S., 68; Barbier v. Connolly, 113 U. S., 27, 32.) 'Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the state. (1 Cooley on Taxation, [3rd Ed.] 260.)"

Finally it was held in that case that the tax in question was not imposed upon property, but on the transfer of a certain class of property, extensively bought and sold throughout the state, and that there was no discrimination in the imposition of the tax involved in that case.

It is next earnestly insisted by counsel for appellants that the act now under consideration makes a discrimination within the class designated by such act. In support of the contention it is insisted by counsel for appellants that the inequality of the value of the property sold in the places designated by the statute is so
147 gross as to render the provisions of the statute imposing the license or stamp tax unreasonable, and that such inequality in value is sufficient to warrant the courts in holding such statute invalid.

Again, with all due respect to the ability and learning of counsel for appellants, we are unable to give our assent to the contentions upon this proposition. It must not be overlooked that the question of a tax involved in this proceeding is a mere license or stamp tax for the right or privilege of participating in dealings and transactions in a business calling and at places pointed out by the statute. The imposition of this license or stamp tax does not depend upon any principle of valuation or on any notice to the taxpayer. This was expressly ruled in the New York case, to which reference has heretofore been made. It was further pointed out in that case that even the tax which was there involved was not a direct tax governed by the rule of appraisement, and was not an indirect tax governed by the rule of uniformity. That it was not like a general tax upon the bulk of the property in the state which must be paid in any event; that the payment of the tax was dependent upon a sale. If there was no sale there was no tax. The court said:

"Neither notice nor grievance day is required, for no valuation is made except by the statute itself, and there is no provision in either constitution requiring such a tax to be laid down on an *ad valorem* basis. There can be no tax without a sale, even if the property is of great value and is owned in every household. Then a sale is made the tax follows, and the legislature had the right to measure it in any way that it saw fit."

148 The court then proceeded to direct attention as to what had been done and fully recognized by the court along the line of the imposition of a tax irrespective of value, and pointed out that "a tax of two cents on every check, regardless of the amount for which it was drawn, and of five cents on a written contract, whether it covered a transaction involving hundreds or thousands, may be referred to as examples of what has been done without serious question in the imposition of excise taxes. A poll tax does not depend upon the income or earning capacity of the person subjected to it. A tax on carriages, guns and watches does not rest on the value of the subjects taxed. They are counted, not appraised: (citing Hylton v. United States, 3 Dall., 171; Bells Gap R. R. Co. v. Pennsyl-

vania, 134 U. S., 232, 237). The same is true of an excise tax on legal process, domestic animals, avocations and the like, of which there have been many instances during the history of the nation and the different states. Such powers of taxation, as was said in the late case, 'have admittedly belonged to state and nation from the foundation of the government.' (Knowlton v. Moore, 178 U. S., 41, 60.) 'Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll-taxes, license taxes (not dependent on the extent of his business) and generally, specific taxes on things, or persons, or occupations. In such cases the legislature fixes its amount and that is the end of the matter * * * No right of his is therefore invaded. Thus if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, there is nothing the owner can do which can affect the amount to be collected from him.' (Hagar v. Reclamation District, 111 U. S., 701, 709.)"

The ruling by the New York Court of Appeals in People ex rel. Hatch v. Reardon, supra, was fully upheld by the supreme
149 court of the United States in 204 U. S., 152. The contentions in the supreme court of the United States in that case were substantially the same as in the case when pending in the New York Court of Appeals, and in many respects similar to the contentions made in the case at bar. It was there insisted that the classification was arbitrary; that it was a direct tax upon property or its value, and finally that the discrimination between the class selected rendered the statute unreasonable. The rulings of the supreme court upon these propositions were adverse to the contentions so ably and earnestly urged. It appears that in that case the question was involved as to requiring a memorandum in writing, and the court simply said that "a statute requiring a memorandum in writing is quite as clearly a regulation of a business as a tax."

As applicable to the subject of discrimination, which is now under consideration in the case at bar, the inequality of the value of the stocks sold was urged as one of the strong reasons why the owners of the stocks were deprived of their property without due process of law. The court, in reciting the facts, said:

"One of the stocks was worth thirty dollars and seventy-five cents a share of the face value of one hundred dollars, the other one hundred and seventy-two dollars."

The court discussing these facts, as applicable to inequality in value, used this language:

"The inequality of the tax, so far as actual values are concerned, is manifest. But, here again equality in this sense has to
150 yield to practical considerations and usage. There must be a fixed and undisputable mode of ascertaining a stamp act. In another sense, moreover, there is equality. When the taxes on two sales are equal, the same number of shares is sold in each case; that is to say, the same privilege is used to the same extent. Valuation is not the only thing to be considered. As was pointed out by the court of appeals, the familiar stamp tax of two cents on checks,

irrespective of amount, the poll tax of a fixed sum, irrespective of income or earning capacity, and many others, illustrate the necessity and practice of sometimes substituting count for weight. See Bell Gap Railroad Co. v. Pennsylvania, 134 U. S., 232; Merchant and Manufacturers' Bank v. Pennsylvania, 17 U. S., 461. Without going farther into a discussion which, perhaps, could have been spared in view of the decision in Thomas v. United States, 192 U. S., 363, and the constitutional restrictions upon Congress, we are of the opinion that the New York statute is valid, so far as the Fourteenth Amendment is concerned."

What was said in that case may very appropriately be applied to the case at bar. This statute, in harmony with the rule announced, provided and fixed an indisputable mode of ascertaining the amount of the license or stamp act, and manifestly there was equality, for the license or stamp tax was required on sales whether large or small, and the same privilege was awarded to the entire class selected who desired to exercise the privilege in dealing in transactions at the places designated by the statute could be used by each member of the class to the same extent. This same principle was clearly announced in the case of People ex rel. W. E. & C. Co. v. Meitz, 193 N. Y., l. c., 160.

In Magoun v. Illinois Trust & Savings Bank, 170 U. S., l. c., 300, it was expressly held, in treating of the subject of equality in 151 taxation, that the "rule does not require, as we have seen, exact equality in taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances."

This is a sufficient indication of our views upon this proposition. We have pointed out in the well-considered adjudicated cases by the highest courts in the land the rules applicable to this subject with which we are now confronted, and our conclusion deduced from a most careful consideration of such authorities to which we have made reference, is that the statute now under consideration is not invalid by reason of any discrimination in the class selected, or by reason of any equality in the imposition of the requirement that a memoranda shall be made by the seller to the purchaser of the commodities sold, in the manner and at the places provided for by the law, and that a twenty-five cent stamp shall be placed upon each memoranda of sale so made at such places.

In arriving at the conclusion as indicated upon this proposition, we have by no means been unmindful of the authorities cited by learned counsel for appellants. We have carefully considered the case of People v. Mansching, 79 N. E. Rep., 884-886, as well as the other cases to which our attention was directed, and in our opinion those cases can readily be distinguished from the cases upon which we have predicated our conclusion. In fact, the recitation of the facts upon which those cases were decided furnishes the distinction between them and the cases to which we have made reference.

152

III.

This brings us to the consideration of the insistence on the part of the appellants that the statute now under consideration is illegal and invalid for the reason that it interferes with interstate commerce, and is therefore violative of the provisions of section 1, article 8 of the constitution of the United States.

It is sufficient to say upon this proposition, after a most careful consideration of the subject, that in our opinion the license or stamp tax required by the statute involved in this proceeding upon sales made at the places and in the manner provided by the statute does not, even in the remotest degree, interfere with interstate commerce. This subject was in judgment in the supreme court of the United States in the Hatch case. It was fully discussed by that court and all of the authorities applicable to the subject were fully considered, and the conclusion reached was that there was not a shadow of a ground for calling the transaction between the parties, in which a stamp tax was required upon a memoranda of sales, interstate commerce. The court said in that case, in treating of this subject, that "the communications between the parties were not between different states, as in Western Union Telegraph Co. v. Texas, 105 U. S., 460, and the bargain did not contemplate or induce the transport of property from one state to another, as in the drummer cases. Rearick v. Pennsylvania, supra. The bargain was not affected in any way, legally or practically, by the fact that the parties happened to have come from another state before they made it. It does not appear that the petitioner came into New York to sell his stock. * * * It appears only that he sold after coming into the state. But
153 we are far from implying that it would have made any difference if he had come to New York with the supposed intent before any bargain was made. * * * The fact that the property sold is outside of the state and the seller and buyer foreigners, are not enough to make a sale commerce with foreign nations or among the several states, and that is all that there is here. On the general question there should be compared with the drummer cases the decisions on the other side of the line. Nathan v. Louisiana, 8 How., 73; Woodruff v. Parham, 8 Wall. 123; Brown v. Houston, 114 U. S., 622; Emert v. Missouri, 156 U. S., 296. A tax is not a constitutional regulation in every case where an absolute prohibition of sales would be one. American Steel & Wire Co. v. Speed, 192 U. S., 500. We think it unnecessary to explain at greater length the reasons for our opinion that the petitioner has suffered no unconstitutional wrong."

It must not be overlooked that the license or stamp tax required by the statute involved in this proceeding is not a tax upon property, but is a requirement to place a twenty-five cent stamp upon the sale of property made in the manner and at the places provided for by such statute. In other words, it is a license or stamp tax upon a particular kind of contract when made in this state. This proposition confronted the New York court of appeals in the Hatch case, *supra*, and in treating of the subject of a stamp tax upon sales of certificate of stock, that court thus stated the law:

"The certificate, itself, is not liable for the tax, but the person selling it is. The tax is not a lien on certificates, nor on shares, which may be owned to any extent throughout the state, free from any

claim under the statute in question. It is the sale alone that gives rise to the tax, which is imposed through the command of the law to the seller to pay the tax when the contract to sell is made,
154 and it is enforced not by levy and sale, but by civil and penal remedies against the person of the seller. While this tax, the same as all other taxes, must ultimately come out of the property of the seller, it cannot be enforced against the certificate sold as distinguished from his other property."

In further discussing that question it was said that "jurisdiction over persons who make the contract does not depend on their residence, but on their presence within the state when the contract is made. Jurisdiction over property depends on its physical presence here, or if it is personal property, either its presence here or the residence of the owner here. * * * When two citizens of Connecticut come into this state and make a contract here, to be enforced here, both they and their contract are subject to its laws, and they are not only entitled to the protection thereof, but are under the same obligation to obey as if they were citizens. Such a contract is valid or invalid as our laws declare. When the law commands that if they, or any other person, whether residents or not, make a certain contract here they must pay a certain tax for the privilege; the command is personal, addressed to them as persons then within the state, and is as binding on them as if they resided in the state. Their rights and their obligations in reference to such a contract are the same as if they were citizens no greater and no less. The fact that the contract, though made here, may relate to property, real or personal, situated elsewhere, has no bearing upon the question. By coming into the state they are subjected themselves to its laws and to its taxing power, so far as the making of such a contract is concerned. It is immaterial whether the contract is between residents or non-residents, or between a resident and a non-resident, for if it is made within the state it is subject to taxation by the state."

Manifestly the state has power within its territory to regulate all business done, and, as was said in Matter of McPherson, 104 N. Y., 3067:

155 "It has never be-n questioned that the legislature can impose a tax upon all sales of property, upon all incomes, upon all acquisitions of property, upon all business and upon all transfers."

The requirements of the statute now under consideration have no bearing or influence whatever upon property sold. It is addressed to those furnishing the places as well as those who deal in the transaction in such places. In other words, in sales of property in the manner and at the places pointed out by the statute it is required, where a sale is made in the manner contemplated by that statute that the seller shall make a memoranda of such sale and place upon such memoranda a twenty-five cent stamp. We repeat, that transactions of this character have no influence whatever upon commerce between different states, and, as was in substance said by the supreme court of the United States, sales of this character do not contemplate or have anything to do with the transportation of property from one state to another, as in the drummer cases, and the mere fact that the parties to such sale, or either one of them happens to be a resident of another state, in no way, legally or practically, affects the transaction and falls far short of subjecting such transaction to condemnation for the reason that it interferes with interstate commerce. Our conclusion upon this proposition is that this statute in no way interferes with interstate commerce and should not be held invalid for that reason.

IV.

Finally it is insisted by counsel for appellants that the title 156 to this act is defective, and therefore is not in harmony with the provisions of section 28, article 4 of the constitution of this state. Our attention upon this insistence is directed to the provisions of section 3.

It is said in the brief of counsel for appellants that "the object of the law as expressed in its title is to make 'it unlawful * * * to buy or sell' certain articles except upon certain conditions, and providing penalties therefor. The act in addition makes it unlawful 'to keep or cause to be kept * * * any office, store or other place wherein is permitted the buying or selling' which is in question. This is a separate and distinct provision and its violation is a crime separate and distinct from that of the seller or buyer who violates the law."

Directing our attention to this proposition, it may be said that while counsel correctly state that the purpose of the law, as expressed in i-s title, is to make "it unlawful * * * to buy or sell" certain articles except upon certain conditions, and providing penalties therefor. The contention of counsel is predicated upon the provisions in the body of the act, that is, that the act, in addition to making it unlawful to buy or sell, makes it unlawful "to keep or cause to be kept * * * any office, store or other place wherein is permitted the buying or selling, which is in question. It is argued that to keep or cause to be kept a place for the buying or selling is a separate and distinct provision, and its violation is a crime separate and distinct from that of the seller or buyer who violates the law.

There is no subject that has more frequently had the attention of this court than the one in which acts of the general as-157 sembly have been challenged for failure to conform its legislation to the requirements of section 28, article 4 of the constitution of this state, which substantially provides that no bill shall contain more than one subject, which shall be clearly expressed in its title. It is this provision of the constitution that appellants invoke in the case at bar.

The rules applicable to this subject are firmly established in this jurisdiction. It has been uniformly and repeatedly held by this court that the objects and purposes of these constitutional provisionwere to prevent incongruous, disconnected matters which had no relation to each other, from being joined in one bill; however, it has always been recognized that all matters that are germane to the principal subject and have a natural connection with it, might properly be incorporated in the same bill. O'Connor v. Transit Co., 198 Mo. l. c., 633.

In Ewing v. Hoblitzelle, 85 Mo., 64, the rule applicable to this subject was very clearly and correctly announced. It was there said:

"Where all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single * * * and, if it is sufficiently expressed in the title, the statute is valid."

To the same effect is State ex rel. Attorney-General v. Miller, 100 Mo., 439; City of St. Louis v. Tiefel, 42 Mo., 578; State v. Mathews,
44 Mo., 523; State v. Miller, 45 Mo., 495; City of Hannibal v.
158 County of Marion, 69 Mo., 571; State ex rel. v. Mead, 71 Mo.,
268.

In State ex rel. v. Bronson, 115 Mo., 271, it was ruled that this provision of the constitution should be reasonably and liberally construed and applied, due regard being had to its object and purpose. It was also again announced in the case last cited that if all the provisions of the bill have a natural relation and connection, then the subject was single, and this, too, though the bill contains many provisions. See also the comparatively recent cases, which are in line with cases heretofore referred to, of State v. Doerring, 194 Mo., 398; Coffey v. City of Carthage, 200 Mo., 616; Taylor v. St. Louis Transit Co., 198 Mo., 715; State ex rel. v. Delmar Jockey Club, 200 Mo., 34.

The object of the law now under consideration is clearly expressed in the title of the act, that is making it unlawful to buy or sell certain articles except upon certain conditions, and providing penalties therefor. The provision in the act to which reference is not made in terms in the title of the act, upon which appellants predicate their insistence concerning this subject, is that it shall be unlawful to keep or cause to be kept any office, store or other place wherein is permitted the buying or selling, etc., without a compliance with the conditions imposed by the statute. Applying the rules applicable to this subject announced in the cases heretofore referred to, it is clear that the provision directed to persons furnishing the places wherein
articles are bought and sold is germane to the principal sub-
159 ject and has a natural connection with it. Manifestly, if the
penalties imposed will prevent the class of persons designated
in the statute, either artificial or natural, from furnishing the places where the buying and selling takes place without requiring a compliance with the conditions imposed, in our opinion, would aid very materially in carrying out the purposes and objects of the law, as expressed in its title. The provision to which our attention has been directed, which embraces the persons who furnish the places for the buying and selling of the articles, without seeing that the conditions are complied with, in our opinion, are germane to the subject as expressed in the title and has a very close and natural connection with such subject. Our conclusion upon this proposition is that the title to this act is in harmony with the provisions of article 4, section 28 of the constitution of this state, and that the provisions in the body of the act are in keeping with the subject, as expressed in its title.

We have given expression to our views, as herein indicated, which results in the conclusion that the act upon which this prosecution rests is constitutional and valid, and the judgment of the trial court should be affirmed, and it is so ordered.

All concur.

JAMES D. FOX, *J.*

And thereafter, to-wit, on March 21, 1910, the Court made and entered of record the following:

No. 15738.

STATE OF MISSOURI, Respondent,
vs.
T. J. BRODNAX et al. Appellants.

Come now the said appellants, by attorney, and file their motion to transfer this cause to the Court in Banc.

Which said motion is in words and figures as follows.

160 In the Supreme Court of the State of Missouri.

No. 15738.

STATE OF MISSOURI, Respondent,
vs.
THOMAS J. BRODNAX and FRANK E. ESSEX, Appellants.

Motion to Transfer to Court in Banc.

Come now appellants and state to the court that the above entitled cause is one of great importance to a large and important class of citizens of the State and involving the validity of an act of the legislature which it is claimed is violative of the constitutions both of the United States and of the State.

Wherefore appellants pray that this cause may be transferred to the court in banc and set for hearing at the January 1910 call thereof.

FRANK HAGERMAN,
R. F. WALKER,
KIMBROUGH STONE,
Attorneys for Appellants.

And thereafter, to-wit: on March 31, 1910, the Court made and entered of record the following:

No. 15738.

STATE OF MISSOURI, Rsepondent,
vs.
THOS. J. BRODNAX et al., Appellants.

Now at this day, the court having considered and fully understood the appellants' motion to transfer this cause to the Court in

Banc, doth order that the said motion be sustained, and the said cause is ordered transferred to the Court in Banc, and set for hearing at the April Term, 1910.

And thereafter, to wit, on April 30, 1910, the Court made and entered of record the following:

161–173 No. 15738.

STATE OF MISSOURI, Rsepondent,
vs.
THOS. J. BRODNAX et al., Appellants,

Come now the said parties, by attorneys, and after argument herein, submit the cause to the court.

* * * * * * *

174 Ans thereafter, to-wit, on May 13, 1910, the Court made and entered of record the following, to-wit:

STATE OF MISSOURI, Respondent,
vs.
THOMAS J. BRODNAX and FRANK E. ESSEX, Appellants.

Appeal from Jackson County Criminal Court.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Jackson County Criminal Court rendered, be in all things affirmed, and stand in full force and effect, and that the said respondent recover against the said appellants its costs and charges herein expended, and have therefor execution.

(Opinion filed.)

Which said opinion is in words and figures as follows, to-wit:

175 FOX, *C. J.:*

The following opinion heretofore rendered by Division Number Two is hereby adopted as the opinion of the Court in Banc.

Gantt, Burgess, Valliant and Lamm, JJ. concur. Graves, J. dissents. Woodson, J. not sitting.

176 In the Supreme Court of Missouri, Division No. 2, Oct. Term, 1909.

(January Call, 1910.)

No. 15738.

STATE OF MISSOURI, Respondent,
vs.
THOMAS J. BRODNAX and FRANK E. ESSEX, Appellants.

This is a prosecution of the defendants begun in the Criminal Court of Jackson county, Missouri, for a violation of an act of the Legislature passed in 1907, and commonly known as the "Stamp Act." This act was approved March 8, 1907.

The indictment upon which the judgment in this cause rests, omitting formal parts, is as follows:

"The Grand Jurors for the County of Jackson, State of Missouri, being duly empanelled upon their oath present and charge that at the County of Jackson, State of Missouri, on the — day of January, 1908, Thomas J. Broadnax and Frank E. Essex, officers and agents of the Board of Trade of Kansas City, Missouri, a voluntary association, did then and there wilfully and unlawfully keep and cause to be kept a place commonly called the trading floor of the Board of Trade of Kansas City, wherein was then and there permitted the buying and selling of grain, provisions and other commodities, on margins and otherwise, and where at the time of such sales, so permitted as aforesaid, the grain, provisions and other commodities, so sold as aforesaid, were not then and there actually paid for and delivered, and at such time and place the sellers, or any of them,
whose names are to the Grand Jury unknown, of the grain,
177 provisions and other commodities, so sold on margins and
otherwise, as aforesaid, did not then and there cause to be made a complete record of the grain, provisions and other commodities, sold the purchasers and the time of delivery in a book kept for that purpose, and at said time and place the sellers, or any of them, whose names are to the Grand Jury unknown, did not then and there deliver to the purchasers of said grain, provisions and other commodities, so sold as aforesaid, a written or printed memoranda of said sales, on which they, the said sellers, or any of them, had placed or caused to be placed a stamp of the value of twenty-five cents, which they, the sellers, had purchased of the State Auditor and had on hand before making such sales; contrary to the statutes in such case made and provided, and against the peace and dignity of the State."

To this indictment the defendants interposed a demurrer in which the constitutionality of the act upon which the indictment is predicated is challenged. Such demurrer, in substance, alleged that said indictment does not state facts which constitute an offense against the State of Missouri, and that the statute, the violation of which is alleged in said indictment, is null and void, being in violation of sections 20 and 30 of article II, and sections 28 and 53 of Article IV, and of sections 3 and 4 of article X of the Constitution of the State of Missouri, and of the Interstate Commerce provisions of section 8 of article I, and of the Fourteenth Amendment to the Constitution of the United States.

The defendants were duly arraigned and entered each for himself a plea of not guilty.

By consent of the parties to this proceeding a jury was waived and the cause was submitted to the court for trial. Before the introduction of any evidence defendants objected to the introduction of any evidence on the following grounds, to-wit:

178 "1. The statute under which this proceeding is instituted is discriminatory, abridges the privileges and immunities of citizens of the United States, deprives defendants of their property without due process of law, and denies to them the equal protection of the law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

2. The statute under which the proceeding is instituted is an unwarranted attempt to regulate interstate commerce and is violative of Section 8, Article 1, of the Constitution of the United States.

3. The statute under which this proceeding is instituted is invalid as a tax not levied in proportion to value, in violation of Section 4, of Article X, Constitution of Missouri.

4. The statute under which the proceeding is instituted is invalid as providing for a tax which is not uniform upon the same class of subjects, in violation of Section 3, of Article X, Constitution of Missouri.

5. The statute under which the proceeding is instituted is void, being a special law, in violation of Sec. 53, of Article IV, Constitution of Missouri.

6. The statute under which the proceeding is instituted is void being passed in a bill which contained more than one subject and which subjects were not clearly expressed in the title thereof, in violation of Section 28 of Article IV of the Constitution of Missouri.

7. The statute under which the proceeding is instituted is void as depriving defendants of property without due process of law, in violation of Section 30 of Article II, Constitution of Missouri.

8. The statute under which the proceeding is instituted is void as taking private property for private use without compensation, in violation of Section 20 of Article II, Constitution of Missouri." 179

The objections thus made were by the court overruled, the defendants properly preserving their exceptions to the action of the court in overruling such objections. The cause was then submitted to the court upon the following agreed statement of facts, subject to the objections as herein indicated. The agreed facts were as follows:

"The defendants are citizens of the United States and of Jackson County, Missouri. The title of the act under which the indictment was found is, 'An Act making it unlawful for any corporation, copartnership or person to buy or sell, for future delivery, stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, without at the time delivering or receiving a written memoranda with a stamp purchased of the state auditor, and to provide a road fund, and to prescribe the manner of its distribution; and providing penalties for the violation thereof.' That Thomas J. Brodnax and Frank E. Essex, of Jackson County, Missouri, defendants herein, on the — day of January, 1908, as members, officers and agents of the Board of Trade of Kansas City, Missouri, a voluntary association, did keep and cause to be kept a place commonly known and called 'a trading floor' of the Board of Trade of Kansas City, Missouri, wherein was permitted the buying and selling of grain, provisions and other commodities on margins and otherwise, and where, at the time of such sales so permitted as aforesaid, the grain, provisions and other commodities, so sold, as aforesaid, were not actually paid for and delivered, and at the time and place of such sales the sellers or any of them, of the grain, provisions and other commodities as aforesaid, so sold on margins and otherwise, did not deliver to the purchasers of said grain, 180 provisions and other commodities so sold as afore-said, written or printed memoranda of said sales on which they (the sellers) or any of them had placed or caused to be placed a stamp of the value of twenty-five cents which they (the sellers) had purchased of the State Auditor of the State of Missouri and had on hand before the making of such sales.'

To all of the above facts the defendants object as incompetent, irrelevant and immaterial and because the statute the violation of which is alleged in the indictment herein filed is null and void, being in violation of Sections 20 and 30, of Article II, Sections 28 and 53 of Article IV, Sections 3 and 4 of Article X, of the Constitution of the State of Missouri, and the interstate commerce provisions of Section 8 of Article 1, and of the Fourteenth Amendment to the Constitution of the United States, which objections are by the court overruled.

To which ruling the defendants then and there excepted.

'A substantial part of the sale aforesaid being of grain, provisions and other commodities which were at the time of sale in course of transportation as articles of interstate commerce.'

To the facts immediately preceding the State objects as incompetent, irrelevant and immaterial, which objection is by the court overruled."

At the conclusion of the evidence the defendants requested the court to give numerous declarations of law. We deem it unnecessary to reproduce in the statement the declarations of law so requested. It is sufficient to say that they were along the lines of the grounds alleged in the demurrer and the objections urged to the introduction of any evidence at the commencement of the trial. All of the declarations of law as requested were by the court re- 181 fused, to which action of the court in refusing such declarations the defendants duly preserved their exceptions. The cause was then submitted to the court and the defendants were found guilty as charged in the indictment, and their punishment assessed at a fine of fifty dollars each.

Timely motions for new trial and in arrest of judgment were filed, and by the court taken up and overruled. Judgment was entered in accordance with the finding of the court, and from this judgments defendants, in due time and proper form, prosecuted this appeal, and the record is now before us for consideration.

Opinion.

The record before us discloses that the defendants were convicted in the Criminal Court of Jackson county, Missouri upon an indictment by the grand jury of said county, charging them with a violation of an act of the General Assembly of Missouri, passed in 1907, and approved March 8th of that year. The act upon which the indictment in this cause and the judgment of conviction must rest, was as follows:

"An act making it unlawful for any corporation, copartnership or person to buy or sell, for future delivery, stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, without at the time delivering or receiving a written memoranda with a stamp purchased of the State Auditor, and to provide a road fund, and to prescribe the manner of its distribution; and providing penalties for the violation thereof.

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"Section 1. It shall be unlawful for any corporation, association, co-partnership or person to keep, or cause to be kept, in this State, any office, store or other place wherein is permitted the buying or selling the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, 182 either on margins or otherwise, where the same is not at the time actually paid for and delivered, without at the time of the sale the seller shall cause to be made a complete record of the thing sold, the purchasr and the time of delivery in a book kept for that purpose; and at the same time the seller shall deliver to the purchaser a written or printed memoranda of said sale, on which he shall place, or cause to be placed, a stamp of the value of twenty-five cents, which the seller shall purchase of the State Auditor, and have on hand before making such sale; and it shall be the duty of the State Auditor, upon the passage of this act, to have printed or engraved stamps for this purpose, of such design as he may select; and on application any payment for said stamps, to immediately furnish the same to the applicants applying therefor: Provided, further, that it shall be unlawful for the purchaser to receive the memoranda aforesaid until it bears the stamp above provided for.

"Sec. 2. The fund arising from the sale of the stamps provided for in section one of this act shall, in the hands of the State Auditor, constitute a road fund; and it shall be the duty of the said auditor to distribute said fund, annually, to the counties in the State and the city of St. Louis, in the same proportions and in like manner as the State school funds are now distributed by him.

"Sec. 3. Any person, whether acting individually or as a member, or as an officer, agent or employé of any corporation, association or co-partnership, who shall be guilty of violating any of the provisions of section one, shall, upon conviction thereof, be fined in any sum not less than fifty, nor more than one thousand dollars, and in addition thereto may be imprisoned in the county or city jail for a period of not less than thirty days, nor to exceed one year.

"Approved March 8, 1907."

183 The validity of this statute is challenged by learned counsel for appellants upon numerous grounds, which may thus be briefly stated:

First. It is insisted that the statute is purely a revenue measure.

Second. That the tax provided by the statute is not uniform, and hence is violative of the fourteenth amendment of the Constitution of the United States, as well as sections 3 and 4 of article 10, and section 53 of article 4, and section 30 of article 2 of the Constitution of Missouri.

Third. It is earnestly contended that the statute is an interference with interstate commerce; hence, is violative of section 1 of article 8 of the Constitution of the United States.

These are the propositions confronting us and their solution must be sought by a fair and reasonable application of the rules of law applicable to the questions presented. We will treat the propositions in the order as herein indicated.

I.

Directing our attention to the insistence of counsel for appellant that this act is a revenue measure and its validity must be tested by the taxing power, it is sufficient to say, in our opinion, that the test of the validity of thic act is not to be applied to the usual taxing power in the imposition of a direct or property tax in any of the forms in which they are ordinarily imposed. Manifestly the act does not provide a direct or property tax in any form whatever, but simply provides for an excise or stamp tax on the right, privilege and occupation of buying or selling shares of stocks, or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, either on margins or otherwise, where the same is not at the time actually paid for and delivered. As was said in Nicol v. Ames, 173 U. S. 509, where a tax of this character was in judgment

184 before that court, that "the tax is in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted, but is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. It is not a tax upon the members of the exchange nor upon the membership therein, nor is it a tax upon the sales generally. The act limits the tax to sales at any

exchange or board of trade, or other similar place, and its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place or any product or merchandise."

So it may be said of this act, that it has no application to sales generally, but it is directed to any corporation, association, co-partnership or person that keeps or causes to be kept in this State any office, store or other place for the purpose of transacting certain forms of commercial dealings, that is to say, wherein the buying or selling is permitted of shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, on margins or otherwise, where the same is not at the time actually paid for and delivered. In other words, by the act it is sought to regulate the places of business as designated in the Statute where stocks, bonds, etc., are bought and sold on margins or otherwise, where the same is not at the time actually paid for and delivered, by requiring, in the transaction of business of that character, that a complete record of the things sold, the name of the purchaser and the time of delivery in a book kept for that purpose, with the further requirement
that the seller shall deliver to the purchaser a written or
185 printed memoranda of such sale, on which he shall place,
or cause to be placed, a stamp of the value of twenty-five
cents.

This act has no application to the ordinary and usual business transactions, such as might be conducted by merchant or butcher who are engaged in the business of selling goods, wares, merchandise and provisions, and who may sell such goods, wares, merchandise and provisions upon credit, but is directed to a class of business which has made marked advancements along the lines of commercial transactions, particularly in the large cities and towns of this country. It has application to corporations, associations, co-partnerships or persons that may keep and furnish meeting places for those engaged in the purchase or sale of commodities or other things to be sold upon margins or otherwise, and to sales made in such places without at the time any payment being made for the article purchased or any delivery of such article. This act embraces every character of association, whether they be corporations or voluntary associations, or whether they be called boards of exchange or boards of trade, as well as embracing partnerships and individuals who may keep and furnish places of the character designated by this act.

Dealings of the character and the places furnished for such dealings which are sought to be regulated by the imposition of certain conditions and a stamp tax upon sales that are made, are not subjects which are unknown, either to the people or to the legislative bodies that may in a legislative way deem it essential to give them consideration. They are places where important transactions occur; in fact it is at such places that frequently the prices of commodities are fixed, and an enormous amount of business of the country is transacted and takes place upon boards of trade or exchange and other places of similar character.

In Nicol v. Ames, supra, it was fully recognized that
186 dealings in the places of the character designated by the act
were subjects of such importance as to demand the consid-
eration and attention of even the taxing power of the government. It was said in that case that the places of the character treated of in the act now under consideration "furnish a meeting place for those engaged in the purchase and sale of commodities or other things to be sold, and in that way they offer facilities for a market for them. Dealings among members so engaged tend to establish the market price of the articles they deal in, and that price is very apt to be the price for the same article when bought or sold outside. The price is arrived at by offers to sell on the one side and to purchase on the other until, by what has frequently been termed, the 'higgling' of the market, a price is agreed upon and the sales are accomplished. In arriving at this price, of course the great law of the cost of production and also that of supply and demand enter into the problem, and it is upon a consideration of all matters regarded as material that the agreement to buy and sell is made. The prices thus fixed are usually followed when the transaction occurs outside, and the market price means really the exchange price. That an enormous amount of the business of the country which is engaged in the distribution of the commodities grown or produced therein is transacted and takes places through the medium of boards of trade or exchanges cannot be doubted. Nor is there any doubt that these exchanges facilitate transactions of purchase and sale, and it would seem that such facilities or privileges, even though not granted by the Government or by a state, ought nevertheless to be recognized as existing facts and to be subject to the judgment of Congress as fit matters for taxation."

Manifestly if the authority of the taxing power may be invoked
and certain taxes imposed upon the dealings and transactions
187 now under consideration, for a much stronger reason the
power to regulate and impose a license or stamp tax by the
State government should not be seriously questioned under the Constitution and laws of this State. The provisions of this act simply impose certain conditions upon the transactions in the places furnished and designated by the Statute, that is to say, it imposes a license or stamp tax, which is fully set forth in the statute, and while this tax may furnish a revenue, it falls far short of being a purely revenue measure by the exercise of the taxing power of the State in the imposition of a direct tax upon property or values of property.

In the Constitution of the State of California there was a provision absolutely prohibiting sales on margins, and this provision was upheld by the Supreme Court of the United States in Otis v. Parker, 187 U. S. loc. cit. 109-10. The court in discussing the provision, said: "We cannot say that there might not be conditions of public delirium in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be though a salutary thing, even if we disagreed with the opinion. Of course, if a man can buy on margin he can launch into a much more

extended venture than where he must pay the whole price at once. If he pays the whole price he gets the purchased article, whatever its worth may turn out to be. But if he buys stocks on margins he may put all his property into the venture, and being unable to keep his margins good if the stock market goes down, a slight fall leaves him penniless, with nothing to represent his outlay." So it may be said of the act now under consideration. There is no impropriety (the regulations not being unreasonable), in regulat-
188 ing the dealings at the places to which the statute refers. It simply provides for a record being kept of all the sales and purchases, the names of the sellers and purchasers and then emphasizes it with the requirement that a memoranda of the sale must be given to the purchaser by the seller, duly stamped with a stamp of the character provided for by the statute.

There are many good reasons for the regulation of business transactions of the character with which we are dealing, and they are so well known to the business public that we will not burden this opinion by enumerating the many good results that will flow from a strict regulation of the transaction of business of the class and character of which the statute now under consideration treats. It is sufficient to direct attention to the case of Otis v. Parker, supra, wherein the Supreme Court of the United States clearly indicated the dangers to which dealing in margins and futures might lead.

We shall not pursue this subject further. We are unable to give our assent to learned counsel's first contention that this is a revenue measure and that its validity must be tested by the Constitution and laws applicable to the taxing power in the imposition of taxes directly upon property or the value of property.

II.

We are next confronted with the proposition insisted upon by counsel for appellants that the tax is not uniform. It is urged that this tax is not directed and imposed upon the same class of subjects within the territorial limits of the authorities levying the tax, and that the classification of subjects is not a true classification. In other words, that the classification of subjects for taxation is unreasonable. It is also insisted that the tax discriminates between members of the class affected thereby.

189 For these reasons the provisions of the statute now under consideration, which provide for a license or stamp tax upon the dealin-s and transactions in the places designated in the statute are assailed as being violative of the due process of law and equal protection of the laws, provided for in the fourteenth amendment of the Constitution of the United States, as well as section 30, article 2, and section 53, article 4 and section 3, article 10 of the State Constitution.

It is sufficient to say upon this proposition that we pointed out in the first paragraph of this opinion the class of persons to whom this law is directed, and the character of dealings and transactions to which the law was made applicable. In our opinion, this law clearly embraces every class, whether it be corporation, association, either voluntary or otherwise, partnership or person which furnishes a place for dealing in sales of stocks, bonds, etc., upon margins or otherwise, where the same is not at the time actually paid for and delivered, and embraces all classes who may deal in such places so furnished.

It is clear that the character of business which is treated of by the statute is fully recognized as a separate and distinct business from all other classes. That the statute embraces every class, whether it be corporation, association, partnership or person who may furnish a place or may deal in transactions in such places, there can be, in our opinion, no sort of doubt; therefore we conclude that so far as the class of persons to whom this law is made applicable, whether natural or artificial, this statute embraces the entire class and is not subject to the objection that it singles out a part of a legal class upon
which the license or stampt tax is imposed and exempts others
190 of the same class. Manifestly the selection of the business
calling and the class pursuing such calling were proper and appropriately selected by the Legislature of this State in dealing with that subject.

It is next insisted that the attempted classification of transactions is arbitrary. This same objection, (and it was earnestly insisted upon), to the classification of subjects for taxation, was in judgment in People ex rel. Hatch v. Reardon, 184 N. Y. 1. c. 442. In that case the subject was exhaustively treated and the authorities applicable to it were all carefully reviewed and the rulings of the court upon substantially the same propositions involved in the case at bar, were adverse to the contentions of learned counsel for appellants. It was insisted in the New York case that the classification made by selecting one kind of property and taxing the transfer of that only, was so arbitrary, discriminating and unreasonable as to deprive certain persons of their property without due process of law and to withhold from them the equal protection of the laws. It was said by the court in that case that all taxation is arbitrary, for the reason that it compels the citizen to give up a part of his property. It was also said that it is generally discriminating, for otherwise everything would be taxed, which has never yet been done, and there would be no exemption on account of education, charity or religion, and frequently it is unreasonable, but that does not make it unconstitutional, even if the result is double taxation. Further discussing this proposition the New York court used this language: "A tax may be imposed only on certain callings and trades, for when the state exerts its power to tax it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental
purposes. It would be an intolerable burden if the state could
191 not tax any property or calling unless at the same time it
taxed all property or all callings." citing Connolly v. Union Sewer Pipe Co. 184 U. S. 540; 562; Armour Packing Co. v. Lacey, 200 U. S. 226, 235.

"The legislature must decide when and how and for what public purposes a tax shall be levied, and must select the subjects of taxation." 1 Cooley on Taxation, (3rd Ed.) 255.

The Hatch case by the New York court, very clearly, and in our opinion, correctly announced this rule, that: "The legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon others, the remedy for injudicious action being in the hands of the people, not of the courts. Arbitrary selection and discrimination characterize the history of legislation, both State and National, with reference to taxation, yet, when all persons and property in the same class are treated alike, it has uniformly been sustained both by the State and Federal courts. * * * The power of taxation necessarily involves the right of selection, which is without limitation, provided all persons in the same situation are treated alike and the tax imposed equally upon all property of the class to which it belongs. (Matter of McPherson, 104 N. Y. 306, 318; Matter of Gould, 156 N. Y. 423, 427). The equal protection of the laws 'only requires the same means and methods to be applied impartially to all the constituents of each class, so that the laws shall operate equally and uniformly upon all persons in similar circumstances. (Kentucky R. R. Cases, 115 U. S. 321, 337). Or, in other words, all persons must 'be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' Magoun v. Illinois Trust and Savings Bank, 170 U. S. 283, 293; Hayes v. Missouri, 120 U. S. 68; Barbier v. Connolly, 113 U. S. 27, 32.) 'Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the state." (1 Cooley on Taxation, (3rd Ed.) 260. Finally it was held in that case that the tax in question was not imposed upon property, but on the transfer of a certain class of property, extensively bought and sold throughout the State, and that there was no discrimination in the imposition of the tax involved in that case.

It is next earnestly insisted by counsel for appellants that the act now under consideration makes a discrimination within the class designated by such act. In support of this contention it is insisted by counsel for appellants that the inequality of the value of the property sold in the places designated by the statute is so gross as to render the provisions of the statute imposing the license or stamp tax unreasonable, and that such inequality in value is sufficient to warrant the courts in holding such statute invalid.

Again, with all due respect to the ability and learning of counsel for appellants, we are unable to give our assent to the contentions upon this proposition. It must not be overlooked that the question of a tax involved in this proceeding is a mere license or stamp tax for the right or privilege of participating in dealings and transactions in a business calling and at places pointed out by the statute. The imposition of this license or stamp tax does not depend upon any principle of valuation or on any notice to the taxpayer. This was expressly ruled in the New York case, to which reference has heretofore been made. It was further pointed out in that case that even the tax which was there involved was not a direct tax governed by

the rule of appraisement, and was not an indirect tax gov-
193 erned by the rule of uniformity. That it was not like a gen-
eral tax upon the bulk of property in the State which must be paid in any event; that the payment of the tax was dependent upon a sale. If there was no sale there was no tax. The court said: "Neither notice nor grievance day is required, for no valuation is made except by the statute itself, and there is no provision in either Constitution requiring such a tax to be laid down on an ad valorem basis. There can be no tax without a sale, even if the property is of great value and is owned in every household. When a sale is made the tax follows, and the legislature had the right to measure it in any way that it saw fit." The court then proceeded to direct attention as to what had been done and fully recognized by the court along the line of the imposition of a tax irrespective of value, and pointed out that "a tax of two cents on every check, regardless of the amount for which it was drawn, and of five cents on a written contract, whether it covered a transaction involving hundreds or thousands, may be referred to as examples of what has been done without serious question in the imposition of excise taxes. A poll tax does not depend upon the income or earning capacity of the person subjected to it. A tax on carriages, guns and watches does not rest on the value of the subjects taxed. They are counted, not appraised;" citing Hylton v. United States, 3 Dall. 171; Bells Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, 237. "The same is true of an excise tax on legal process, domestice animals, avocations and the like, of which there have been many instances during the history of the nation and the different states. Such powers of taxation, as was said in the late case, 'have admittedly belonged to state and nation from the foundation of the government.' (Knowlton v. Moore, 178 U. S. 41, 60.) 'Of the different kinds of taxes which the State
may impose, there is a vast number of which, from their
194 nature, no notice can be given to the taxpayer, nor would
notice be of any possible advantage to him, such as poll-taxes, license taxes (not dependent on the extent of his business) and generally, specific taxes on things, or persons, or occupations. In such cases the legislature fixes its amount and that is the end of the matter. * * * No right of his is therefore invaded. Thus if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, there is nothing the owner can do which can affect the amount to be collected from him.' (Hagar v. Reclamation District, 111 U. S. 701, 709.)"

The ruling of the New York Court of Appeals in People ex rel. Hatch v. Reardon, supra, was fully upheld by the Supreme Court of the United States in 204 U. S. 152. The contentions in the Supreme Court of the United States in that case were substantially the same as in the case when pending in the New York Court of Appeals, and in many respects similar to the contentions made in the case at bar. It was there insisted that the classification was arbitrary; that it was a direct tax upon property or its value, and finally that the discrimination between the class selected rendered the statute unreasonable. The rulings of the Supreme Court upon these propositions were adverse to the contentions so ably and earnestly urged. It appears that in that case the question was involved as to requiring a memorandum in writing, and the court simply said that "a statute requiring a memorandum in writing is quite as clearly a regulation of a business as a tax."

As applicable to the subject of discrimination, which is now under consideration in the case at bar, the inequality of the value of the stocks sold was urged as one of the strong reasons why the owners
of the stocks were deprived of their property without due pro-
195 cess of law. The court, in reciting the facts, said: "One of
the stocks was worth thirty dollars and seventy-five cents a share of the face value of one hundred dollars, the other one hundred and seventy-two dollars." The court discussing these facts, as applicable to inequality in value, used this language: "The inequality of the tax, so far as actual values are concerned, is manifest. But, here again equality in this sense has to yield to practical considerations and usage. There must be a fixed and indisputable mode of ascertaining a stamp act. In another sense, moreover, there is equality. When the taxes on two sales are equal, the same number of shares is sold in each case; that is to say, the same privilege is used to the same extent. Valuation is not the only thing to be considered. As was pointed out by the court of appeals, the familiar stamp tax of two cents on checks, irrespective of amount, the poll tax of a fixed sum, irrespective of income or earning capacity, and many others, illustrate the necessity and practice of sometimes substituting count for weight. See Bell Gap Railroad Co. v. Pennsylvania, 134 U. S. 232; Merchant and Manufacturers' Bank v. Pennsylvania, 167 U. S. 461. Without going farther into a discussion which, perhaps, could have been spared in view of the decision in Thomas v. United States, 192 U. S., 363, and the constitutional restrictions upon Congress, we are of the opinion that the New York statute is valid, so far as the Fourteenth Amendment is concerned."

What was said in that case may very appropriately be applied to the case at bar. This statute, in harmony with the rule announced, provided and fixed an indisputable mode of ascertaining the amount of the license or stamp tax, and manifestly there was equality, for the license or stamp tax was required on sales whether large or small, and the same privilege was awarded to the entire class selected who
desired to exercise the privilege in dealing in transactions
196 at the places designated by the statute could be used by each
member of the class to the same extent. This same principle was clearly announced in the case of People ex rel. W. E. & C. Co. v. Meitz, 193 N. Y. l. c. 160.

In Magoun v. Illinois Trust & Savings Bank, 170 U. S. l. c. 300, it was expressly held, in treating of the subject of equality in taxation, that the "rule does not require, as we have seen, exact equality in taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances."

This was a sufficient indication of our views upon this proposition. We have pointed out in the well-considered adjudicated cases by the highest courts in the land the rules applicable to this subject with which we are now confronted, and our conclusion deduced from a most careful consideration of such authorities to which we have made reference, is that the statute now under consideration is not invalid by reason of any discrimination in the class selected, or by reason of any inequality in the imposition of the requirement that a memoranda shall be made by the seller to the purchaser of the commodities sold, in the manner and at the places provided for by the law, and that a twenty-five cent stamp shall be placed upon each memoranda of sale so made at such places.

In arriving at the conclusion as indicated upon this proposition, we have by no means been unmindful of the authorities cited by learned counsel for appellants. We have carefully considered the case of People v. Mansching, 79 N. E. Rep. 884-886, as well as the other cases to which our attention was directed, and in our opinion those cases can readily be distinguished from the cases upon which we have predicated our conclusion. In fact the recitation of the facts upon which those cases were decided furnishes the distinction between them and the cases to which we have made reference.

197

III.

This brings us to the consideration of the insistence on the part of the appellants that the statute now under consideration is illegal and invalid for the reason that it interferes with interstate commerce, and is therefore violative of the provisions of section 1, article 8 of the Constitution of the United States.

It is sufficient to say upon this proposition, after a most careful consideration of the subject, that in our opinion the license or stamp tax required by the statute involved in this proceeding upon sales made at the places and in the manner provided by the statute does not, even in the remotest degree, interfere with interstate commerce. This subject was in judgment in the Supreme Court of the United States in the Hatch case. It was fully discussed by that court and all of the authorities applicable to the subject were fully considered, and the conclusion reached was that there was not a shadow of a ground for calling the transaction between the parties, in which a stamp tax was required upon a memoranda of sales, interstate commerce. The court said in that case, in treating of this subject, that "the communications between the parties were not between different states, as in Western Union Telegraph Co. v. Texas, 105 U. S. 460, and the bargain did not contemplate or induce the transport of property from one state to another, as in the drummer cases, Rearick v. Pennsylvania, supra. The bargain was not affected in any way, legally or practically, by the fact that the parties happened to have come from another state before they made it. It does not appear that the petitioner came into New York to sell his stock. * * * It appears only that he sold after coming into the state. But we are far from implying that it would have made any difference if he had come to New York with the supposed intent before any bargain was made. * * * The fact that the property sold is outside
198 of the State and the seller and buyer foreigners, are not enough to make a sale commerce with foreign nations or

among the several states, and that is all that there is here. On the general question there should be compared with the drummer cases the decisions on the other side of the line. Nathan v. Louisiana, 8 How. 73; Woodruff v. Parham, 8 Wall. 123; Brown v. Houston, 114 U. S. 622; Emert vs. Missouri, 156 U. S. 296. A tax is not a constitutional regulation in every case where an absolute prohibition of sales would be one. American Steel & Wire Co. v. Speed, 192 U. S. 500. We think it unnecessary to explain at greater length the reasons for our opinion that the petitioner has suffered no unconstitutional wrong."

It must not be overlooked that the license or stamp tax required by the statute involved in this proceeding is not a tax upon property, but is a requirement to place a twenty-five cent stamp upon the sale of property made in the manner and at the places provided for by such statute. In other words, it is a license or stamp tax upon a particular kind of contract when made in this State. This proposition confronted the New York Court of Appeals in the Hatch case, supra, and in treating of the subject of a stamp tax upon sales of certificates of stock, that court thus stated the law: "The certificate, itself, is not liable for the tax, but the person selling it is. The tax is not a lien on certificates, nor on shares, which may be owned to any extent throughout the State, free from any claim under the statute in question. It is the sale alone that gives rise to the tax, which is imposed through the command of the law to the seller to pay the tax when the contract to sell is made, and it is enforced not by levy and sale, but by civil and penal remedies against the person of the seller. While this tax, the same as all other taxes, must ultimately come out of the property of the seller, it cannot be enforced
199 against the certificate sold as distinguished from his other
property." In further discussing that question it was said that "jurisdiction over the persons who make the contract does not depend on their residence, but on their presence within the State when the contract is made. Jurisdiction over property depends on its physical presence here, or if it is personal property, either its presence here or the residence of the owner here. * * * When two citizens of Connecticut come into this State and make a contract here, to be enforced here, both they and their contract are subject to its laws, and they are not only entitled to the protection thereof, but are under the same obligation to obey as if they were citizens. Such a contract is valid or invalid as our laws declare. When the law commands that if they, or any other person, whether residents or not, make a certain contract here they must pay a certain tax for the privilege; the command is personal, addressed to them as persons then within the State, and is as binding on them as if they resided in the State. Their rights and their obligations in reference to such a contract are the same as if they were citizens, no greater and no less. The fact that the contract, though made here, may relate to property, real or personal, situated elsewhere, has no bearing upon the question. By coming into the State they subjected themselves to its laws and to its taxing power, so far as the making of such a contract is concerned. It is immaterial whether the contract

is between residents or non-residents, or between a resident and a non-resident, for *if* it *is* made within the State it is subject to taxation by the State."

Manifestly the State has power within its territory to regulate all business done, and, as was said in Matter of McPherson, 104 N. T. 306, "It has never been questioned that the Legislature can impose a tax upon all sales of property, upon all incomes, upon all acquisitions of property, upon all business and upon all
200 transfers."

The requirements of the statute now under consideration have no bearing or influence whatever upon property sold. It is addressed to those furnishing the places as well as those who deal in the transaction in such places. In other words, in sales of property in the manner and at the places pointed out by the statute it is required, where a sale is made in the manner contemplated by that statute that the seller shall make a memoranda of such sale and place upon such memoranda a twenty-five cent stamp. We repeat, that transactions of this character have no influence whatever upon commerce between different states, and, as was in substance said by the Supreme Court of the United States, sales of this character do not contemplate or have anything to do with the transportation of property from one state to another, as in the drummer cases, and the mere fact that the parties to such sale, or either one of them happen to be a resident of another state, in no way, legally or practically, affect the transaction and falls far short of subjecting such transaction to condemnation for the reason that it interferes with interstate commerce. Our conclusion upon this proposition is that this statute in no way interferes with interstate commerce and should not be held invalid for that reason.

IM.

Finally it is insisted by counsel for appellants that the title to this act is defective, and therefore is not in harmony with the provisions of section 28, article 4 of the Constitution of this State. Our attention upon this insistence is directed to the provisions of section 3.

It is said in the brief of counsel for appellants that "the object of the law as expressed in its title is to make 'it unlawful * * * to buy or sell' certain articles except upon certain
201 conditions, and providing penalties therefor. The act in addition makes it unlawful 'to keep or cause to be kept * * * any office, store or other place wherein is permitted the buying or selling' which is in question. This is a separate and distinct provision and its violation is a crime separate and distinct from that of the seller or buyer who violates the law."

Directing our attention to this proposition, it may be said that while counsel correctly state that the purpose of the law, as expressed in its title, is to make "it unlawful * * * to buy or sell" certain articles except upon certain conditions, and providing penalties therefore. The contention of counsel is predicated upon the provisions in the body of the act, that is, that the act, in addition to making it unlawful to buy or sell, makes it unlawful "to keep or cause to be kept * * * any office, store or other place wherein is permitted the buying or selling," which is in question. It is argued that to keep or cause to be kept a place for the buying or selling is a separate and distinct provision, and its violation is a crime separate and distinct from that of the seller or buyer who violates the law.

There is no subject that has more frequently had the attention of this court than the one in which acts of the General Assembly have been challenged for failure to conform its legislation to requirements of section 28, article 4 of the Constitution of this State, which substantially provides that no bill shall contain more than one subject, which shall be clearly expressed in its title. It is this provision of the Constitution that appellants invoke in the case at bar.

The rules applicable to this subject are firmly established in this jurisdiction. It has been uniformly and repeatedly held by this court that the objects and purposes of this constitutional
202 provisions were to prevent incongruous, disconnected matters
which had no relation to each other, from being joined in one bill; however, it has always been recognized that all matters that are germane to the principal subject and have a natural connection with it, might properly be incorporated in the same bill. O'Connor v. Transit Co. 198 Mo. l. c. 633.

In Ewing v. Hoblitzelle, 85 Mo. 64, the rule applicable to this subject was very clearly and correctly announced. It was there said: "Where all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single * * * and, if it is sufficiently expressed in the title, the statute is valid." To the same effect is State ex rel. Attorney-General v. Miller, 100 Mo. 439; City of St. Louis v. Tiefel, 42 Mo. 578; State v. Mathews, 44 Mo. 523; State v. Miller, 45 Mo. 495; City of Hannibal v. County of Marion, 69 Mo. 571; State ex rel. v. Mead, 71 Mo. 268.

In State ex rel. v. Bronson, 115 Mo. 271, it was ruled that this provisions of the Constitution should be reasonably and liberally construed and applied, due regard being had to its object and purpose. It was also again announced in the case last cited that if all the provisions of the bill have a natural relation and connection, then the subject was single, and this, too, though the bill contains many provisions. See also the comparatively recent cases, which are in line with cases heretofore referred to, of State v. Doerring, 194 Mo. 398; Coffey v. City of Carthage, 209 Mo. 616; Taylor v. St. Louis Transit Co. 198 Mo. 715; State ex rel. v. Delmar Jockey Club, 200 Mo. 34.

The object of the law now under consideration is clearly
203 expressed in the title of the act, that is making it unlawful
to buy or sell certain articles except upon certain conditions, and providing penalties therefor. The provision in the act to which reference is not made in terms in the title of the act, upon which appellants predicate their insistence concerning this subject, is that it shall be unlawful to keep or cause to be kept any office, store or other place wherein is permitted the buying or selling, etc., with-

out a compliance with the conditions imposed by the statute. Applying the rules applicable to this subject announced in the cases heretofore referred to, it is clear that the provision directed to persons furnishing the places wherein articles are bought and sold is germane to the principal subject and has a natural connection with it. Manifestly, if the penalties imposed will prevent the class of persons designated in the statute, either artificial or natural, from furnishing the places where the buying and selling takes place without requiring a compliance with the conditions imposed, in our opinion, would aid very materially in carrying out the purposes and objects of the law, as expressed in its title. The provision to which our attention has been directed, which embraces the persons who furnish the places for the buying and selling of the articles, without seeing that the conditions are complied with, in our opinion, are germane to the subject as expressed in the title and has a very close and natural connection with such subject. Our conclusion upon this proposition is that the title to this act is in harmony with the provisions of article 4, section 28 of the Constitution of this State, and that the provisions in the body of the act are in keeping with the subject, as expressed in its title.

We have given expression to our views, as herein indicated, which results in the conclusion that the act upon which this prose-
204 cution rests is constitutional and valid, and the judgment of the trial court should be affirmed, and it is so ordered.

JAMES D. FOX, *J.*

All concur.

And thereafter, to-wit, on May 23rd, 1910, the Court made and entered of record, the following:

State of Missouri, Respondent,
vs.
Thos. J. Brodnax and Frank E. Essex, Appellants.

Now, at this day, there is presented to the Honorable James D. Fox, Chief Justice of the Supreme Court of Missouri, in chambers, a writ of error to the Supreme Court of the United States, a citation directed to said respondent, citing and admonishing him to appear at the Supreme Court of the United States on the twenty-second day of June, 1910; an assignment of errors and a bond in the sum of Five Hundred Dollars ($500.00) which said writ of error is allowed, said citation signed and issued, said assignment of errors filed, and said bond approved, ordered filed and made a part of the record herein.

Which said writ of error, citation, assignment of error and bond are in words and figures as follows, to-wit:

205 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of Missouri, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Missouri before you, or some of you, being the highest Court of Law and Equity of the said state in which a decision could be had in the said suit, wherein Thomas J. Brodnax and Frank E. Essex each was an appellant and the State of Missouri was respondent wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilge, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of each of the said appellants, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 22nd day of June next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right,
206 and according to the Laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23rd day of May, in the year of our Lord, nineteen hundred and ten.

Issued at office in Jefferson City, Missouri, with the seal of the Circuit Court of the United States for the Western District of Missouri, Central Division, dated as aforesaid.

[SEAL.]

H. C. GEISBERG,
Clerk of said Circuit Court.

Allowed be me.

JAMES D. FOX,
Chief Justice of the Supreme Court of Missouri.

207 **United States of America:**

To Respondent State of Missouri, and Elliott W. Major, Attorney General Thereof:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington thirty days from and after the date this citation bears date, pursuant to a writ of error filed in the clerk's office of the Supreme Court of Missouri, wherein Thomas J. Brodnax and Frank E. Essex each is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against each of the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable James D. Fox, Chief Justice of the Supreme Court of Missouri, this 23rd day of May, 1910.

JAMES D. FOX,
Chief Justice.

Due service of the within citation accepted on behalf of defendants in error, this 23rd day of May, 1910.

ELLIOTT W. MAJOR,
Attorney General.

208 In the Supreme Court of Missouri, April Term, 1910.

No. 15,738.

State of Missouri, Respondent,
v.
Thomas J. Brodnax, Frank E. Essex, Appellants.

Petition for Writ of Error.

Now comes each of the above named appellants as a petitioner, and prays for a writ of error to the Supreme Court of the United States to review the judgment in above entitled cause, an assignment of errors being hereto attached and made part hereof.

FRANK HAGERMAN,
PERCY WERNER,
KIMBROUGH STONE,
Attorneys for Petitioners.

Allowed this 23rd day of May, 1910.

JAMES D. FOX,
Chief Justice of the Supreme Court of Missouri.

209 In the Supreme Court of Missouri, April Term, 1910.

No. 15,738.

STATE OF MISSOURI, Respondent,
v.
THOMAS J. BRODNAX, FRANK E. ESSEX, Appellants.

Assignment of Errors.

Now comes each of the above named appellants and respectfully represents;

A judgment was entered in above entitled cause, affirming the judgment of the Criminal Court of Jackson County, Missouri, at Kansas City, and petition for rehearing timely filed was overruled at the April 1910 Term. The court in its judgment erred;

1. In holding to be valid and constitutional the act of the legislature of Missouri approved March 8, 1909, and entitled: "An Act making it unlawful for any corporation, co-partnership or person to buy or sell, for future delivery, stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities without at the time delivering or receiving a written memoranda with a stamp purchased of the state auditor, and to provide a road fund, and to prescribe the manner of its distribution; and providing penalties for the violation thereof."

2. In not holding that, the statute under which this proceeding is instituted is discriminatory, abridges the privileges and immunities of citizens of the United States, deprives defendants of their property without due process of law, and denies to them the equal protection of the law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

210 3. In not holding that the statute under which the proceeding is instituted is an unwarranted attempt to regulate interstate commerce and is violative of Section 8, Article 1, of the Constitution of the United States.

4. In not holding that said act denied to petitioners the equal protection of the law accorded to them by the said amendment.

5. In affirming each judgment against each appellant whereby the erroneous rulings aforesaid were made.

FRANK HAGERMAN,
PERCY WERNER,
KIMBROUGH STONE,
Attorneys for Appellants.

211 In the Supreme Court of Missouri, April Term, 1910.

No. 15738.

STATE OF MISSOURI, Respondent,
v.
THOMAS J. BRODNAX, FRANK E. ESSEX, Appellants.

Bond.

Know all men by these presents that we, Thomas J. Brodnax and Frank E. Essex, as principals and Kimbrough Stone as surety, are held and firmly bound to the State of Missouri in the penal sum of five hundred dollars ($500.00) for the payment of which, well and truly to be made, we jointly and severally bind ourselves, our successors and assigns firmly by these presents.

The condition of this obligation is such that,

Whereas, in the above case, in above entitled court, a judgment has been entered, affirming that of the Criminal Court of Jackson County, Missouri, at Kansas City, and it is the desire of the appellants to review the judgment and decision of the said court in the Supreme Court of the United States, and a writ of error has been prayed for and allowed to that end;

Now, therefore, if each of the said appellants as plaintiff in error, shall prosecute his writ of error to effect, pay all damages and answer all costs if he shall fail to make his plea good, then the above obligation to be void; otherwise to be and remain in full force.

In witness whereof, the parties hereto have caused these presents to be signed this 23rd day of May, 1910.

THOS. J. BRODNAX,
FRANK E. ESSEX,
Principals.
KIMBROUGH STONE,
Surety.

The foregoing bond is hereby approved as a supersedeas, this 23rd day of May, 1910.

JAMES D. FOX,
Chief Justice of the Supreme Court of Missouri.

212 STATE OF MISSOURI, *ss:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri hereby certify that the above and foregoing is a full, true and complete copy of the transcript in the case of State of Missouri, Respondent, against Thomas J. Brodnax and Frank Essex, appellants, filed in this office July 26th, 1909, as fully and complete as the same appears of record and on file in my office.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court. Done at office in the City of Jefferson this 28 day of May A. D. 1910.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk Supreme Court.

213 In the Supreme Court of the United States.

THOMAS BRODNAX, FRANK E. ESSSEX, Plaintiffs in Error.
v.
STATE OF MISSOURI, Defendant in Error.

Assignment of Errors and Designation of Parts of Record to be Printed.

1. The assignment of errors was filed in the court below and appears on pages 209-210, and are hereby referred to and adopted as if filed herein. Same are as follows:

Now comes each of the above named appellants and respectfully represents:

A judgment was entered in above entitled cause, affirming the judgment of the Criminal Court of Jackson County, Missouri, at Kansas City, and petition for rehearing timely filed was overruled at the April 1910 Term. The court in its judgment erred:

1. In holding to be valid and constitutional the act of the legislature of Missouri approved March 8, 1909, and entitled: "An Act making it unlawful for any corporation, co-partnership or person to buy or sell, for future delivery, stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities without at the time delivering or receiving a written memoranda with a stamp purchased of the state auditor, and to provide a road fund, and to prescribe the manner of its distribution; and providing penalties for the violation thereof."

2. In not holding that, the statute under which this proceeding is instituted is discriminatory, abridges the privileges and immunities of citizens of the United States, deprives defendants of their property without due process of law, and denies to them the equal protection of the law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

3. In not holding that the statute under which the proceeding is instituted is an unwarranted attempt to regulate commerce and is violative of Section 8, Article 1, of the Constitution of the United States.

214 4. In not holding that said act denied to petitioners the equal protection of the law accorded to them by the said amendment.

5. In affirming each judgment against each appellant whereby the erroneous rulings aforesaid were made.

2. The clerk will omit from the record as printed, the following:

(*a*) The abstract statement and brief for appellant. (Transcript, pp. 19-44.)

(*b*) Respondent's statement abstract Brief and Argument (Transcript, pp. 45-96).

(*c*) Amended and substituted abstract of appellants (Transcript, 97-110).

(*d*) Reply brief of appellants (Transcript, pp. 111-127).

(*e*) Opinion as filed in Division (Transcript, pp. 129-159).

(*f*) Appellants' supplemental brief (Transcript, pp. 161-173).

3. The remainder of the record constitutes the parts thereof which plaintiffs in error think necessary for the consideration of the errors upon which they rely.

KIMBROUGH STONE,
FRANK HAGERMAN,
Attorneys for Plaintiffs in Error.

Service hereof acknowledged this June 7th, 1910.

ELLIOTT W. MAJOR,
Attorney for Defendant in Error.

215 [Endorsed:] 598-10 — 22219. Frank Hagerman, attorney, at Law, Kansas City, Missouri.

216 [Endorsed:] File No. 22,219. Supreme Court U. S., October Term, 1909. Term No. 598. Thomas J. Brodnax and Frank E. Essex, Pl'ffs in Error, vs. The State of Missouri. Assignment of errors and designation by counsel for plaintiffs in error of parts of record to be printed, and proof of service of same. Filed June 13, 1910.

217 In the Supreme Court of the United States.

THOMAS J. BRODNAX, FRANK E. ESSEX, Plaintiffs in Error,
vs.
STATE OF MISSOURI, Defendant in Error.

Designation of Additional Parts of the Record Which Defendant in Error Thinks Material and Asks to Have Printed.

The State of Missouri, Defendant in Error, through its attorney and counselor, Elliott W. Major, Attorney-General, herewith designates the additional parts of the record which it thinks material and necessary for the consideration of the case in addition to those parts of the record designated and directed to be printed by plaintiffs in Error, to-wit:

The opinion of Judge Fox as filed in division, (Transcript, pp. 129 to 159 inclusive).

Defendant in Error has no other designation to make as to additional parts of the record but considers those designated by plaintiffs in Error together with the additional designation hereinabove made to be all that is necessary for the consideration of the errors upon which Plaintiffs in Error rely.

ELLIOTT W. MAJOR,
Attorney-General of the State of Missouri,
Attorney and Counselor for Defendant in Error.

218 [Endorsed:] 598-10—22219. In the Supreme Court of the United States. Term No. 598. Oct. Term 1910. Thomas J. Brodnax et al. Plaintiffs in Error vs. State of Missouri, Defendant in Error. Designation of additional parts of record for printing, by Defendant in Error.

219 [Endorsed:] File No. 22,219. Supreme Court U. S., October Term, 1910. Term No. 598. Thomas J. Brodnax et al., Pl'ffs in Error, vs. The State of Missouri. Designation by defendant in error of additional parts of record to be printed. Filed June 23, 1910.

Endorsed on cover: File No. 22,219. Missouri supreme court. Term No. 598. Thomas J. Brodnax and Frank E. Essex, plaintiffs in error, vs. The State of Missouri. Filed June 8th, 1910. File No. 22,219.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 598.

THOMAS J. BROADNAX AND FRANK E. ESSEX, Plaintiffs in Error,

vs.

THE STATE OF MISSOURI, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

DEFENDANT'S STATEMENT, BRIEF AND ARGUMENT.

STATEMENT.

This is a prosecution of the plaintiffs in error, begun in the Criminal Court of Jackson county, Missouri, on the 10th day of January, 1908, for a violation of an act of the Missouri Legislature, passed in 1907, and commonly known as the "Stamp Act." Said act was approved March 8, 1907, and is set out in full in the appendix to this brief.

The indictment upon which plaintiffs in error were prosecuted and convicted, omitting formal parts, is as follows:

INDICTMENT.

"State of Missouri, }
} ss.
County of Jackson. }

The Grand Jurors for the County of Jackson, State of Missouri, being duly empaneled, upon their oath present and charge that at the County of Jackson, State of Missouri, on the —— day of January, 1908, Thomas J. Broadnax and Frank E. Essex officers and agents of the Board of Trade of Kansas City, Missouri, a voluntary association, did then and there willfully and unlawfully keep and cause to be kept a place commonly called the trading floor of the Board of Trade of Kansas City, wherein was then and there permitted the buying and selling of grain, provisions and other commodities, on margins and otherwise, and where at the time of such sales, so permitted as aforesaid, the grain, provisions and other commodities, so sold as aforesaid, were not then and there actually paid for and delivered, and at such time and place the sellers, or any of them, whose names are to the Grand Jury unknown, of the grain, provisions and other commodities, so sold on margins and otherwise, as aforesaid, did not then and there cause to be made a complete record of the grain, provisions and other commodities sold the purchasers and the time of delivery in a book kept for that purpose, and at said time and place the sellers, or any of them, whose names are to the Grand Jury unknown, did not then and there deliver to the purchasers of said grain, provisions and other commodities, so sold as aforesaid, a written or printed memoranda of said sales, on which they, the said sellers, or any of them, had placed or caused to be placed a stamp of the value of twenty-five cents, which they, the sellers, had purchased of the State

Auditor and had on hand before making such sales; contrary to the Statutes in such case made and provided and against the peace and dignity of the State.

ISAAC B. KIMBRELL,
Prosecuting Attorney."

(Rec. pp. 3-4.)

Plaintiffs in error challenge the sufficiency of said indictment by demurrer, which was by the court overruled, and which, omitting formal parts, is as follows:

DEMURRER.

"Come now defendants, Thomas J. Broadnax and Frank E. Essex, and demur to the indictment herein returned, and as grounds therefor say that said indictment does not state facts which constitute an offense against the State of Missouri, and that the statute, the violation of which is alleged in said indictment, is null and void, being in violation of sections 20 and 30 of article II; of sections 28 and 53 of article IV, and of sections 3 and 4 of article X of the Constitution of the State of Missouri, and of the Interstate Commerce provisions of section 8 of article I, and of the Fourteenth Amendment to the Constitution of the United States." (Rec. p. 6.)

By consent of all parties, a jury was waived and the cause was tried by the court. (Rec. p. 6.)

OBJECTION TO INTRODUCTION OF EVIDENCE.

Before the introduction of any evidence, plaintiffs in error made the following objections to the introduction of any evidence in the trial court, on the following grounds:

"1. The statute under which this proceeding is instituted is discriminatory, abridges the privileges and immunities of citizens of the United States, deprives defendants of their property without due process of law, and denies to them the equal protection of the law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

"2. The statute under which the proceeding is instituted is an unwarranted attempt to regulate interstate commerce and is violative of section 8, article 1 of the Constitution of the United States.

"3. The statute under which the proceeding is instituted is invalid as a tax not levied in proportion to value, in violation of section 4 of article X, Constitution of Missouri.

"4. The statute under which the proceeding is instituted is invalid as providing for a tax which is not uniform upon the same class of subjects, in violation of section 3 of article X, Constitution of Missouri.

"5. The statute under which the proceeding is instituted is void, being a special law, in violation of section 53 of article IV, Constitution of Missouri.

"6. The statute under which the proceeding is instituted is void, being passed in a bill which contained more than one subject, which was not clearly expressed in the title thereof, in violation of section 28 of article IV of the Constitution of Missouri.

"7. The statute under which the proceeding is instituted is void as depriving defendants of property without due process of law, in violation of section 30 of article II, Constitution of Missouri.

"8. The statute under which the proceeding is instituted is void as taking private property for private use without compensation, in violation of section 20 of article II, Constitution of Missouri."

Which objections were by the court overruled.

To which ruling defendants then and there excepted." (Rec. pp. 6-7.)

The court overruled said objections, and plaintiffs in error duly saved their exception.

This cause was submitted to the court upon the following agreed statement of facts:

AGREED STATEMENT OF FACTS.

"The defendants are citizens of the United States and of Jackson county, Missouri. The title of the act under which the indictment was found is 'An act making it unlawful for any corporation, copartnership or person to buy or sell, for future delivery, stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, without at the time delivering or receiving a written memoranda with a stamp purchased of the State Auditor, and to provide a road fund, and to prescribe the manner of its distribution; and providing penalties for the violation thereof.' That Thomas J. Broadnax and Frank E. Essex, of Jackson county, Missouri, defendants herein, on the ——— day of January, 1908, as members, officers and agents of the Board of Trade of Kansas City, Missouri, a voluntary association, did keep and cause to be kept a place commonly known and called a 'trading floor' of the Board of Trade of Kansas City, Missouri, wherein was permitted the buying and selling of grain, provisions and other commodities on margins and otherwise, and where, at the time of such sales so permitted as aforesaid, the grain, provisions and other commodities, so sold as aforesaid, were not actually paid for and delivered, and at the time and place of such sales the sellers, or any of them, of the grain, provisions and other commodities as aforesaid, so sold on margins and otherwise, did not deliver to the purchasers of said grain, provisions and other commodities so sold as aforesaid, written or printed memoranda of said sales on which they (the sellers) or any of them had placed or cause to be placed a stamp of the value of twenty-five cents, which they (the sellers) had purchased of the State Auditor of the State of Missouri and had on hand before the making of such sale or sales."

"To all of the above facts the defendants object as incompetent, irrelevant and immaterial, and because the statute, the violation of which is alleged in the indictment herein filed, is null and void, being in violation of sections 20 and 30, of article II, sections 28 and 53 of article IV, sections 3 and 4 of article X, of the Constitution of the State of Missouri, and the interstate commerce provisions of section 8 of article I, and of the fourteenth amendment to the Constitution of the United States, which objections are by the court overruled.

"To which ruling defendants then and there excepted.

"A substantial part of the sales aforesaid being of grain, provisions and other commodities which were at the time of sale in course of transportation as articles of interstate commerce.

"To the facts immediately preceding the State objects as incompetent, irrelevant and immaterial, which objection is by the court overruled.

"To which ruling the State then and there excepted." (Rec. p. 7.)

The court found plaintiffs in error guilty as charged, and assessed a fine against each in the sum of fifty dollars. (Rec. p. 5.)

Both Federal and State constitutional questions having been raised by plaintiffs in error in the trial court and decided against their contentions, the appeal was taken to the Supreme Court of Missouri.

On appeal the cause was assigned to Division No. 2 of said Court, and by that Division the judgment of the lower court was affirmed, Fox, J., writing the opinion for the court.

On motion of plaintiffs in error, the cause was transferred to Court *in banc* for reargument, because of Federal question having been raised and decided against plaintiffs' contentions.

The divisional opinion of Fox, J., was adopted by the court in banc, Graves, J., dissenting, and Woodson, J., not sitting. (Rec. p. 30.)

Plaintiffs in error assign the following errors:

"1. In holding to be valid and constitutional the act of the legislature of Missouri approved March 8, 1909, and entitled 'An act making it unlawful for any corporation, copartnership or person to buy or sell, for future delivery, stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities without at the time delivering or receiving a written memoranda with a stamp purchased of the State Auditor, and to provide a road fund, and to prescribe the manner of its distribution; and providing penalties for the violation thereof.'

"2. In not holding that the statute under which this proceeding is instituted is discriminatory, abridges the privileges and immunities of citizens of the United States, deprives defendants of their property without due process of law, and denies to them the equal protection of the law, contrary to the provisions of the fourteenth amendment of the Constitution of the United States.

"3. In not holding that the statute under which the proceeding is instituted is an unwarranted attempt to regulate interstate commerce and is violative of section 8, article 1 of the Constitution of the United States.

"4. In not holding that said act denied to petitioners the equal protection of the law accorded to them by said amendment.

"5. In affirming each judgment against each appellant whereby the erroneous rulings aforesaid were made." (Rec. p. 50.)

BRIEF AND ARGUMENT.

I.

THE SUPREME COURT OF MISSOURI HAVING CONSTRUED THIS LEGISLATIVE ACT AS BEING AN EXCISE TAX ON THE RIGHT, PRIVILEGE OR OCCUPATION, THAT QUESTION IS THEREFORE DEFINITELY DETERMINED AND WILL NOT BE REVIEWED BY THIS HONORABLE COURT.

We feel but little can be added to the very able and exhaustive opinion rendered in this case by Chief Justice Fox. He fully answered each and every contention made by plaintiffs in error, giving strong and unanswerable reasons and citing many authorities in support of the constitutionality of the statute involved in this suit.

Three questions were determined by the opinion of the court as follows:

> "First. It is insisted that the statute is purely a revenue measure.
>
> "Second. That the tax provided by the statute is not uniform, and hence is violative of the fourteenth amendment of the Constitution of the United States, as well as sections 3 and 4 of article 10, and section 53 of article 4, and section 30 of article 2 of the Constitution of Missouri.
>
> "Third. It is earnestly contended that the statute is an interference with interstate com-

> merce; hence, is violative of section 1 of article 8 of the Constitution of the United States." (Rec. p. 35.)

Thus the questions for the determination of this Court are narrowed down to at least three.

The court held that said act did not provide a property tax as contended by plaintiffs in error. On this point the court said:

> "Manifestly the act does not provide a direct or property tax in any form whatever, but simply provides for an excise or stamp tax on the right, privilege and occupation of buying or selling shares of stocks, or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, either on margins or otherwise, where the same is not at the time actually paid for and delivered." (Rec. p. 35.)

This construction and interpretation of the statute here involved by the highest Court of Missouri will be accepted by this Court as definitely determining that the tax complained of is not a property tax, but a license or excise tax, imposed upon the doing of a particular business, plainly subject to the regulating power of the State.

Brown-Forman Co. vs. Commonwealth of Kentucky, 217 U. S. 563.

Grenada Lumber Co. vs. Mississippi, 217 U. S. 433.

Cargill Company vs. Minnesota, 180 U. S. 452.

In Hatch vs. Reardon, 204 U. S. 152, this Court held that the New York act providing for a tax on transfers of corporation stock was not a tax on property, but an excise or license tax. Hence, this question is firmly settled against the contention of plaintiffs in error.

The Supreme Court of Missouri having determined in this case that the act in question does not violate sections 20 and 30 of article II, nor sections 28 and 53 of article IV, nor sections 3 and 4 of article X of the Constitution of Missouri, those questions are no longer open questions and are not subjects of review by this court. The only questions for the consideration of this Court are the assignments that the legislative act violates the provisions of section 8 of article I of the Constitution of the United States and the 14th article of amendment thereto.

II.

THE LEGISLATIVE ACT DOES NOT VIOLATE ANY OF THE PROVISIONS OF THE 14TH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The plaintiffs in error contend that the statute under which this prosecution was instituted and sustained unduly and unreasonably infringe upon their constitutional rights in this: (1) It discriminates and abridges the privileges and immunities of citizens of the United States; (2) deprives plaintiffs in error of their property without due process of law; and (3) denies to them the equal protection of the law contrary to the provisions of the fourteenth amendment to the Constitution of the United States.

(a) These several contentions are ably answered by the decision of the Supreme Court of Missouri in this case in the following language:

> "We are next confronted with the proposition insisted upon by counsel for appellants that the tax is not uniform. It is urged that this tax is not directed and imposed upon the same class of subjects within the territorial limits of the

authorities levying the tax, and that the classification of subjects is not a true classification. In other words, that the classification of subjects for taxation is unreasonable. It is also insisted that the tax discriminates between members of the class affected thereby.

For these reasons the provisions of the statute now under consideration, which provide for a license or stamp tax upon the dealings and transactions in the places designated in the statute, are assailed as being violative of the due process of law and equal protection of the laws, provided for in the fourteenth amendment of the Constitution of the United States, as well as section 30, article 2, and section 53, article 4 and section 3, article 10 of the State Constitution.

It is sufficient to say upon this proposition that we pointed out in the first paragraph of this opinion the class of persons to whom this law is directed, and the character of dealings and transactions to which the law was made applicable. In our opinion, this law clearly embraces every class, whether it be corporation, association, either voluntary or otherwise, partnership or person which furnishes a place for dealing in sales of stocks, bonds, etc., upon margins or otherwise, where the same is not at the time actually paid for and delivered, and embraces all classes who may deal in such places so furnished.

It is clear that the character of business which is treated of by the statute is fully recognized as a separate and distinct business from all other classes. That the statute embraces every class, whether it be corporation, association, partnership or person who may furnish a place or may deal in transactions in such places, there can be, in our opinion, no sort of doubt; therefore we conclude that so far as the class of persons to whom this law is made applicable, whether natural or artificial, this statute embraces the entire class and is not subject to the objection that it singles out a part of a legal class upon which the license or stamp tax is imposed and exempts others of the same class. Manifestly the selection of the business calling and the class pursuing such calling were proper and appropriately selected by the legislature of this State in dealing with that subject.

It is next insisted that the attempted classification of transactions is arbitrary. This same objection (and it was earnestly insisted upon), to the classification of subjects for taxation, was in judgment in *People ex rel. Hatch* vs. *Reardon,* 184 N. Y. l. c. 442. In that case the subject was exhaustively treated and the authorities applicable to it were all carefully reviewed and the rulings of the court upon substantially the same propositions involved in the case at bar, were adverse to the contentions of learned counsel for appellants. It was insisted in the New York case that the classification made by selecting one kind of property and taxing the transfer of that only was so arbitrary, discriminating and unreasonable as to deprive certain persons of their property without due process of law and to withhold from them the equal protection of the laws. It was said by the court in that case that all taxation is arbitrary, for the reason that it compels the citizen to give up a part of his property. It was also said that it is generally discriminating, for otherwise everything would be taxed, which has never yet been done, and there would be no exemtpion on account of education, charity or religion, and frequently it is unreasonable, but that does not make it unconstitutional, even if the result is double taxation. Further discussing this proposition the New York court used this language:

"A tax may be imposed only on certain callings and trades, for when the state exerts its power to tax it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if the state could not tax any property or calling unless at the same time it taxed all property or all callings (citing *Connolly* vs. *Union Sewer Pipe Co.,* 184 U. S. 540, 562; *Armour Packing Co.* vs. *Lacey,* 200 U. S. 226, 235).

"The legislature must decide when and how and for what public purposes a tax shall be levied, and must select the subjects of taxation." 1 Cooley on Taxation (3rd Ed.), 255.

The Hatch case by the New York court, very clearly, and in our opinion, correctly announced this rule, that:

"The legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon others, the remedy for injudicious action being in the hands of the people, not of the courts. Arbitrary selection and discrimination characterize the history of legislation, both state and national, with reference to taxation, yet when all persons and property in the same class are treated alike, it has uniformly been sustained both by the state and federal courts. '* * * The power of taxation necessarily involves the right of selection, which is without limitation, provided all persons in the same situation are treated alike and the tax imposed equally upon all property of the class to which it belongs.' (*Matter of McPherson*, 104 N. Y. 306, 318; *Matter of Gould*, 156 N. Y. 423, 427.) The equal protection of the laws 'only requires the same means and methods to be applied impartially to all the constituents of each class, so that the laws shall operate equally and uniformly upon all persons in similar circumstances (*Kentucky R. R. Cases*, 115 U. S. 321, 337). Or, in other words, all persons must 'be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' *Magoun* vs. *Illinois Trust and Savings Bank*, 170 U. S. 283, 293; *Hayes* vs. *Missouri*, 120 U. S., 68; *Barbier* vs. *Connolly*, 113 U. S. 27, 32.) 'Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the state. (1 Cooley on Taxation [3rd E.], 260.)"

Finally it was held in that case that the tax in question was not imposed upon property, but on the transfer of a certain class of property, extensively bought and sold throughout the state, and that there was no discrimination in the imposition of the tax involved in that case.

It is next earnestly insisted by counsel for appellants that the act now under consideration makes a discrimination within the class designated by such act. In support of this contention it is insisted by counsel for appellants that the inequality of the value of the property sold in the places designated by the statute is so gross as to render the provisions of the statute imposing the license or stamp tax unreasonable, and that such inequality in value is sufficient to warrant the courts in holding such statute invalid.

Again, with all due respect to the ability and learning of counsel for appellants, we are unable to give our assent to the contentions upon this proposition. It must not be overlooked that the question of a tax involved in this proceeding is a mere license or stamp tax for the right or privilege of participating in dealings and transactions in a business calling and at places pointed out by the statute. The imposition of this license or stamp tax does not depend upon any principle of valuation or on any notice to the taxpayer. This was expressly ruled in the New York case, to which reference has heretofore been made. It was further pointed out in that case that even the tax which was there involved was not a direct tax governed by the rule of appraisement, and was not an indirect tax governed by the rule of uniformity. That it was not like a general tax upon the bulk of property in the State which must be paid in any event; that the payment of the tax was dependent upon a sale. If there was no sale there was no tax. The court said:

"Neither notice nor grievance day is required, for no valuation is made except by the statute itself, and there is no provision in either constitution requiring such a tax to be laid down on an *ad valorem* basis. There can be no tax without a sale, even if the property is of great value and is owned in every household. When a sale is made the tax follows, and the legislature had the right to measure it in any way that it saw fit."

The court then proceeded to direct attention as to what had been done and fully recognized by the court along the line of the imposition of a tax irrespective of value, and pointed out that "a tax of two cents on every check, regardless of the amount for which it was drawn, and of five cents on a written contract, whether it covered a transaction involving hundreds or thousands, may be referred to as examples of what has been done without serious question in the imposition of excise taxes. A poll tax does not depend upon the income or earnng capacity of the person subjected to it. A tax on carriages, guns and watches does not rest on the value of the subjects taxed. They are counted, not appraised: (citing *Hylton* vs. *United States,* 3 Dall., 171; *Bells Gap R. R. Co.* vs. *Pennsylvania,* 134 U. S., 232, 237). The same is true of an excise tax on legal process, domestic animals, avocations and the like, of which there have been many instances during the history of the nation and the different states.

Such powers of taxation, as was said in the late case, 'have admittedly belonged to state and nation from the foundation of the government.' (*Knowlton* vs. *Moore,* 178 U. S. 41, 60.) 'Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as polltaxes,, license taxes (not dependent on the extent of his business) and generally, specific taxes on things, or persons. or occupations. In such cases the legislature fixes its amount and that is the end of the matter. * * * No right of his is therefore invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, there is nothing the owner can do which can affect the amount to be collected from him.' (*Hagar* vs. *Reclamation District,* 111 U. S. 701, 709.)"

The ruling of the New York Court of Appeals in *People ex rel. Hatch* vs. *Reardon, supra,* was fully upheld by the Supreme Court of the United States in 204 U. S. 152. The contentions in the Supreme Court of the United States in that case were substantially the same as in the case when pending in the New York Court of Appeals, and in many respects similar to the contentions made in the case at bar. It was there insisted that the classification was arbitrary; that it was a direct tax upon property or its value, and finally that the discrimination between the class selected rendered the statute unreasonable. The rulings of the Supreme

Court upon these propositions were adverse to the contensions so ably and earnestly urged. It appears that in that case the question was involved as to requiring a memorandum in writing, and the court simply said that "a statute requiring a memorandum in writing is quite as clearly a regulation of a business as a tax."

As applicable to the subject of discrimination, which is now under consideration in the case at bar, the inequality of the value of the stocks sold was urged as one of the strong reasons why the owners of the stocks were deprived of their property without due process of law. The court, in reciting the facts, said:

"One of the stock was worth thirty dollars and seventy-five cents a share of the face value of one hundred dollars, the other one hundred and seventy-two dollars."

The court, discussing these facts, as applicable to inequality in value, used this language:

"The inequality of the tax, so far as actual values are concerned, is manifest. But, here again equality in this sense has to yield to practical considerations and usage. There must be a fixed and undisputable mode of ascertaining a stamp act. In another sense, moreover, there is equality. When the taxes on two sales are equal, the same number of shares is sold in each case; that is to say, the same privilege is used to the same extent. Valuation is not the only thing to be considered. As was pointed out by the court of appeals, the familiar stamp tax of two cents on checks, irrespective of amount, the poll tax of a fixed sum, irrespective of income or earning capacity, and many others, illustrate the necessity and practice of sometimes substituting count for weight. See *Bell Gap Railroad Co.* vs. *Pennsylvania*, 134 U. S. 232; *Merchant and Manufacturers Bank* vs. *Pennsylvanit*, 167 U. S. 461. Without going farther into a discussion which, perhaps, could have been spared in view of the decision in *Thomas* vs. *United States*, 192 U. S. 363, and the constitutional restrictions upon Congress, we are of the opinion that the New York statute is valid, so far as the Fourteenth Amendment is concerned."

What was said in that case may very appropriately be applied to the case at bar. This statute, in harmony with the rule announced, provided and fixed an indisputable mode of ascertaining the amount of the license or stamp tax, and manifestly there was equality, for the license or stamp tax was required on sales whether large or small, and the same privilege was awarded to the entire class selected who desired to exercise the privilege in dealing in transactions at the places designated by the statute could be used by each member of the class to the same extent. This same principle was clearly announced in the case of *People ex rel. W. E. & C. Co.* vs. *Meitz*, 193 N. Y. l. c. 160.

In *Magoun* vs. *Illinois Trust & Savings Bank*, 170 U. S. l. c. 300, it was expressly held, in treating of the subject of equality in taxation, that the "rule does not require, as we have seen, exact equality in taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances."

This is a sufficient indication of our views upon this proposition. We have pointed out in the well-considered adjudicated cases by the highest courts in the land the rules applicable to this subject with which we are now confronted, and our conclusion deduced from a most careful consideration of such authorities to which we have made reference, is that the statute now under consideration is not invalid by reason of any discrimination in the class selected, or by reason of any inequality in the imposition of the requirement that a memoranda shall be made by the seller to the purchaser of the commodities sold, in the manner and at the places provided for by the law, and that a twenty-five cent stamp shall be placed upon each memoranda of sale so made at such places.

In arriving at the conclusion as indicated upon this proposition, we have by no means been unmindful of the authorities cited by learned counsel for appellants. We have carefully considered the case of *People* vs. *Mansching*, 79 N. E. Rep. 884-886, as well as the other cases to which our attention was directed, and in our opinion those cases can readily be distinguished from the cases upon which we have predicated our conclusion. In fact, the recitation of the facts upon which those cases were decided furnishes the distinction between them and the cases to which we have made reference." (Rec. pp. 38-43.)

(b) The State of New York has a law in many respects very similar to the one now being considered. The New York law was upheld by the highest court of that state, as well as by the Supreme Court of the United States. The objection to classification, as urged here, was urged against that law, and in upholding it, the court, in the case of People ex rel. Hatch vs. Reardon, 184 N. Y. l. c. 442 *et seq.,* laid down the following rules as to classification:

> "The classification made by selecting one kind of property and taxing the transfer of that only, is assailed as so arbitrary, discriminating and unreasonable as to deprive certain persons of their property without due process of law and to withhold from them the equal protection of the laws.
>
> All taxation is arbitrary, for it compels the citizens to give up a part of his property; it is generally discriminating, for otherwise everything would be taxed, which has never yet been done, and there would be no exemption on account of education, charity or religion, and frequently it is unreasonable, but that does not make it unconstitutional, even if the result is double taxation. (People vs. Home Ins. Co., 92 N. Y. 328, 347.) The right to tax is not granted by the Constitution, but of necessity underlies it, because government could not exist or perform its functions without it. While it may be regulated and limited by the fundamental law, it exists 'independently of it as a necessary attribute of sovereignty.' (People vs Adirondack Ry. Co., 160 N. Y. 225, 236.) 'The power of taxation being legislative, all the incidents are within the control of the legislature. The purpose for which a tax shall be levied; the extent of taxation: the apportionment of the tax; upon what property or class of persons the tax shall

operate; whether the tax shall be general or limited to a particular locality, and in the latter case, the fixing of a district of assessment; the method of collection, and whether a tax shall be a charge upon both person and property, or only on the land, are matters within the discretion of the legislature, and in respect to which its determination is final.' (Genet vs. City of Brooklyn, 99 N. Y. 296, 306.)

'A tax may be imposed only on certain callings and trades, for when the State exerts its power to tax it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if the State could not tax any property or calling unless at the same time it taxed all property or all callings.' (Connolly vs. Union Sewer Pipe Co., 184 U. S. 540, 562; Armour Packing Co. vs. Lacey, 200 U. S. 226, 235.)

'We cannot say that treating stocks of corporations as a class subject to special restrictions was unjust discrimination or denial of the full protection of the laws.' (Otis vs. Parker, 187 U. S. 606, 610.)

'The legislature must decide when and how and for what public purposes a tax shall be levied, and must select the subjects of taxation. (1 Cooley on Taxation (3rd Ed.) 255.)

'There is no express restriction upon this power in our State Constitution and no implied restriction, except by the primary guaranties relating to life, liberty, property and due process of law. The same is true of the Federal Constitution, except as to ascertain subjects of national interest under the control of Congress, such as imports, patent rights and agencies used to carry the powers of Congress into execution. Subject to these restraints, the legislature has supreme control of the power to tax, and its action, even if arbitrary, discriminating and unreasonable, is binding upon all persons and property within the boundaries of the State. The State retained all the power of legislation that it did not part with in adopting the Federal Constitution or consenting to the amendment thereof, and subject to that exception, it is as supreme as the British Parliament, which is restrained only by the custom of the realm and the conservatism of the people. Taxes upon the right of succession to property by will and intestate law, on special franchises and upon the sale of intoxicating liquors, are recent instances of the exercise of this power by the State through the selection of special subjects of taxation, involving the exemption of all others, each of which was attacked as in violation of both Constitutions, but all were sustained by the courts. The tariff and internal revenue laws show that the same power of selection has been exercised by Congress, and the Federal courts have uniformly upheld it. Indeed, the prototype of the statute before us was an act of Congress passed in 1898, known as the 'War Revenue Act,' imposing a stamp tax on sales, transfers and deliveries of stock certificates, which was sustained, without dissent, by the Circuit and Supreme Courts of the United States. (30 U. S. Stat. 448; United States vs.

Thomas, 115 Fed. Rep. 207; 192 U. S. 363.) A like tax on sales of merchandise, although expressly limited to those made at 'any exchange or board of trade,' leaving all other sales untouched, was also sustained, and the declaration made that 'a sale at an exchange does form a proper basis for a classification which excludes all sales made elsewhere from taxation.' (Nicol vs. Ames, 173 U. S. 509, 521.)

The legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon others, the remedy for injudicious action being in the hands of the people, not of the courts. Arbitrary selection and discrimination characterizes the history of legislation, both State and National, with reference to taxation, yet, when all persons and property in the same class are treated alike, it has uniformly been sustained both by the State and Federal courts. The tax on tobacco, on oleomargarine and the like, is not less arbitrary or discriminating than the tax in question. While a tax upon a particular house, or horse or the houses or horses of a particular man, or on the sale thereof, would obviously invade a constitutional right, still a tax upon all houses, leaving barns and business buildings untaxed, or upon all horses or the sale thereof, leaving sheep and cows untaxed, however unwise, would be within the power of the legislature. This is true of a tax on all houses with more than one chimney,' or 'with more than one hearth-stone,' or on all race horses. The power of taxation necessarily involves the right of selection, which is without limitation, provided all persons in the same situation are treated alike and the tax imposed equally upon all property of the class to which it belongs. (Matter of McPherson, 104 N. Y. 306, 318; Matter of Gould, 156 N. Y. 423, 427.) The equal protection of the laws 'only requires the same means and methods to be applied impartially to all the constituents of each class, so that the laws shall operate equally and uniformly upon all persons in similar circumstances. (Kentucky R. R. Cases, 115 U. S. 321, 337.) Or, in other words, all persons must 'be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' (Magoun vs. Illinois Trust and Savings Bank, 170 U. S. 283, 293; Hayes vs. Missouri, 120 U. S. 68; Barbier vs. Connolly, 113 U. S. 27, 32.) 'Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the State.' (1 Cooley on Taxation (3rd Ed.) 260.)

The tax in question is not imposed upon property, but on the transfer of a certain class of property, extensively bought and sold throughout the State. It does not discriminate between different kinds of stock, taxing the sale of some and leaving others untaxed, but treats all in the class alike. The class includes all sales of certificates issued by any domestic or foreign association, company or corporation. It is a large and comprehensive class, as is shown by the revenue produced, which amounts to five or six mil-

> lions per annum. The sales affected are made chiefly for speculation, which may have influenced the legislature in making the selections. The statute operates equally and uniformly upon all transfers of the class named when made by any person within the State. All persons who sell stocks are treated alike, and all parts of the State are treated alike. It applies with equal force to all sales, whether in the city or country, in exchanges, offices or on the street, by farmers, mechanics, brokers and others. The classification violates neither Constitution.

The New York statute was held valid by this Honorable Court in People ex rel. Hatch, vs. Reardon, 204 U. S. 152.

(c) In the very recent case of Brown-Forman Company vs. Kentucky, 217 U. S. l. c. 572, *et seq.*, Mr. Justice Lurton, answering similar objections made against the "Kentucky Whiskel Blending Act," said:

> "We come then to the question as to whether this act makes an arbitrary and illegal discrimination in favor of other persons or corporations engaged in the same business. The question is at last one of classification of subjects, trades or pursuits for the purpose of taxation, and concerns the power of the states to exercise discretion in the methods, subjects and rates of taxation. Fundamental to the very existence of the governmental power of the states as is this function of taxation, it is nevertheless subject to the beneficent restriction that it shall not be so exercised as to deny to any the equal protection of the law. But this restriction does not compel the adoption of 'an iron rule of equal

taxation,' nor prevent variety in methods of taxation or discretion in the selection of subjects, or classification for purposes of taxation of either properties, businesses, trades, callings or occupations. This much has been over and over announced by this court. *Bell's Gap Rd.* vs. *Pennsylvania*, 134 U. S. 232; *Cargill Co.* vs. *Minnesota*, 180 U. S. 452; *Missouri, Kansas & Texas Railway Co.* vs. *May*, 194 U S. 267; *Cook* vs. *Marshall County*, 196 U. S. 268; *Williams vs. Arkansas*, 217 U. S. 79; *Southwestern Oil Co.* vs. *State of Texas*, 217 U. S. 114.

The answer of the plaintiff in error concedes that it is 'doing business in this State and engaged in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits, known and designated as single stamp spirits.' Plaintiff in error now says that it has been arbitrarily singled out and its business or occupation taxed, thereby discriminating in favor of 'three other classes engaged in the same business.' The first class which is named as favored are distillers who neither rectify, compound, adulterate nor blend their products. Manifestly there is nothing capricious in putting the occupation carried on by the plaintiff in error in a class distinct from that of the whiskey distillers whose straight product is the basis for the manipulated product of those engaged in the taxed business. A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law. The reasons for discriminating between distillers and rectifiers is not obscure, and a classification which includes one and omits the other is by no means arbitrary or unreasonable. In *American Sugar Ref. Co.* vs. *Louisiana*, cited above, a license tax imposed upon the business of refining sugar and molasses was sustained, although planters grinding and refining their own sugar were excluded. In *Cargill Co.* vs. *Minnesota*, 180 U. S. 452, 469, a state statute requiring elevator companies operating elevators situated upon railway rights of way to take out a license, without requiring those not so situated to do so, was held not to be an illegal discrimination. This court there said, in reference to the insistence that the discrimination was a denial of the equal protection of the law, that 'no such judgment could be properly rendered unless the classification was merely arbitrary or was devoid of those elements which are inherent in the distinction implied in classification. We cannot perceive that the requirement of a license is not based upon some reasonable ground—some difference that bears a proper relation to the classification made by the statute.' In *Williams* vs. *State of Arkansas*, cited above, a classification in a state statute which prohibited drumming on trains for business for any hotel, lodging house, bath house, physicians, etc., was sustained

> as not a capricious classification, although it did not apply to drumming for other business not mentioned, but distinguishable by reason of local conditions. In *Southwestern Oil Co.* vs. *State of Texas*, 217 U. S. 114, it was held that an occupation tax on all wholesale dealers in certain articles did not deny to the class taxed the equal protection of the law because a similar occupation tax was not imposed on wholesale dealers in other articles."

In addition to the authorities cited by Mr. Justice Lurton in the Kentucky case, we wish to call the court's attention to the case of McLean vs. Arkansas, 211 U. S. 546, in which a statute making it unlawful for mine owners employing ten or more men under ground in mining coal and paying therefor by the ton mined, to screen the coal before it was weighed, vas held valid; and also that it was not an unreasonable classification to divide coal mines into those where less than ten miners were employed and those where more than that number were employed, and that the State police regulation was not unconstitutional under the equal-protection clause of the Fourteenth Amendment because only applicable to mines where more than ten miners were employed.

In Missouri, Kansas & Texas Railway Company vs. May, 194 U. S. 267, this court held valid an act passed by the Texas legislature imposing a penalty against railway companies for permitting Johnson grass, or Russian thistle, to go to seed upon their right of way, and that it was not shown to so clearly deny the companies equal protection of the laws as to be held contrary to the Fourteenth Amendment.

The well established rule as to the basis for classification for an excise or license tax is stated in People ex rel. W. E. & C. Co. vs. Meitz, 193 N. Y. l. c. 160, 161, to be

> *"Any basis is sufficient even if it seems unreasonable to the courts, provided there is reason enough for it to support an argument so that it could have seemed reasonable to the legislature."*

(d) *The excise tax is uniform on all persons and corporations coming within the classification made by the act. Each person or corporation making a sale of such articles named in the act on "margins," when the same is not delivered and paid for at the time of sale, is required to pay a stamp tax of twenty-five cents. The legislature had a perfect right to fix the amount of the stamp tax on the number of sales made by each broker instead of on the amount of each sale.*

These questions were fully met and discussed by the New York court in the Hatch case, *supra* (l. c. 446, *et seq.*), where the court said:

> "It is claimed that the statute is invalid because it fixes the amount of the tax regardless of the value of the certificates sold or of the sum for which they are sold.
>
> The tax in question in an excise tax which need not depend upon any principle of valuation or on any notice to the taxpayer. It is not a direct tax governed by the rule of appraisement, not an indirect tax governed by the rule of uniformity. It is not like a general tax upon the bulk of property in the State which must be paid in any event, for if there is no sale there is no tax. Neither notice nor grievance day is required, for no valuation is made except by the statute itself, and there is no provision in either Constitution requiring such a tax to be laid on an

ad valorem basis. There can be no tax without a sale, even if the property is of great value and is owned in every household. When a sale is made the tax follows, and the legislature had the right to measure it in any way that it saw fit.

A tax of two cents on every check, regardless of the amount for which it was drawn, and of five cents on a written contract, whether it covered a transaction involving hundreds or thousands, may be referred to as examples of what has been done without serious question in the imposition of excise taxes. A poll tax does not depend upon the income or earning capacity of the persons subjected to it. A tax on carriages, guns and watches does not rest on the value of the subjects taxed. They are counted, not appraised. (Hylton vs. United States, 3 Dall. 171; Bells Gap R. R. Co. vs. Pennsylvania, 134 U. S. 232, 237). The same is true of an excise tax on legal process, domestic animals, avocations and the like, of which there have been many instances during the history of the nation and the different states. Such powers of taxation, as was said in a late case, 'have admitedly belonged to state and nation from the foundation of the government.' (Knowlton vs. Moore, 178 U. S. 41, 60.) 'Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll-taxes, license taxes not dependent on the extent of his business) and generally, specific taxes on things, or persons, or occupations. In such cases the legislature fixes its amount and that is the end of the matter. * * * No right of his is therefore invaded. Thus if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, there is nothing the owner can do which can affect the amount to be collected from him.' (Hagar vs. Reclamation District, 111 U. S. 701, 709.)

Convenience in doing business, the slight cost of collection and the necessity of preventing evasion are important considerations in laying an excise tax and the rule of counting rather than valuing is almost universally adopted, so that the citizen may know at once the amount of the tax and pay it by affixing the stamps required, which are permanent evidence of the sum paid. The statute itself in all such cases, as well as in the case under consideration, apportions the tax and the power of the apportionment is part of the power of taxation. As was said by this court many years ago: 'The power of taxing and the power of apportioning taxation are identical and inseperable. Taxes cannot be laid without apportionment, and the power of apportionment is, therefore, unlimited, unless it be restrained as a part of the power of taxation. There is not, and since the original organization of the state government, there has not been any such constitutional limitation or restraint.' (People ex rel. Griffin vs. Mayor, etc., of Brooklyn, 4 N. Y. 419, 427.) The highest Federal court sustained, without hesitation, as assessment upon the nominal or face value of bonds instead of upon their acutal value, and also declared that absence of notice to the owners of the bonds was

> not a taking of the bondholder's property without due process of law. (Bells Gap R. R. Co. vs. Pennsylvania, 134 U. S. 232; Jennings vs. Coal Ridge Improvement & Coal Co., 147 U. S. 147.) In the Thomas case, precisely as in the case before us, the tax was measured by 'each hundred dollars of face value or fraction thereof.' As our legislauture has all the power of legislation with reference to taxation that the State has, of necessity it has as much power to classify and measure as belongs to Congress. Hence, this point, as well as the last preceding, was involved and decided in the Thomas case even if no expression of consideration appears in the opinions. (United States vs. Thomas, 115 Fed. Rep. 207; 192 U. S. 363.) We think that the apportionment, even when so unequal in result as it was in the two sales described in the affidavit of the complainant, is within the exclusive control of the legislature, with no power in the courts to interfere.

(e) In People ex rel. Hatch vs. Reardon, 204 U. S. l. c. 159-160, this court denied this same contention which was made against the New York Transfer Stamp Act. The court said:

> "Yet another ground on which the owners of stock are said to be deprived of their property without due process of law is the adoption of the face value of the shares as the basis of the tax. One of the stocks was worth thirty dollors and seventy-five cents a share of the face value of one hundred dollars, the other one hun-

> dred and seventy-two dollars. The inequality of the tax, so far as actual values are concerned, is manifest. But, here again equality in this sense has to yield to practical considerations and usage. There must be a fixed and indisputable mode of ascertaining a stamp tax. In another sense, moreover, there is equality. When the taxes on two sales are equal the same number of shares is sold in each case; that is to say, the same privilege is used to the same extent. Valuation is not the only thing to be considered. As was pointed out by the Courts of Appeals, the familiar stamp tax of two cents on checks, irrespective of amount, the poll tax of a fixed sum, irrespective of income or earning capacity, and many others, illustrate the necessity and practice of sometimes substituting count for weight. See *Bell Gap Railroad Co.* vs. *Pennsylvania*, 134 U. S. 232; *Merchant & Manufacturers' Bank* vs. *Pennsylvania*, 167 U. S. 461. Without going farther into a discussion which, perhaps, could have been spared in view of the decision in *Thomas* vs. *United States*, 192 U. S. 363, and the constitutional restrictions upon Congress, we are of the opinion that the New York statute is valid, so far as the Fourteenth Amendment is concerned."

The provisions in the Constitution of the State of California prohibiting sales on "margins," was upheld by this court, in the case of Otis vs. Parker, 187 U. S. l. c. 609-10, and in that case this court pointed out good reasons why such sales might be prohibited entirely. The court said:

> "We cannot say that there might not be conditions of public delirium in which at least a

> temporary prohibition of sales on margins would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion. Of course, if a man can buy on margin he can launch into a much more extended venture than where he must pay the whole price at once. If he pays the whole price he gets the purchased article, whatever its worth may turn out to be. But if he buys stocks on margin he may put all his property into the venture, and being unable to keep his margins good if the stock market goes down, a slight fall leaves him penniless, with nothing to represent his outlay, except that he has had the chances of a bet. There is no doubt that purchases on margin may be and frequently are used as a means of gambling for a great gain or a loss of all one has."

Optional sales in grain were entirely prohibited by statute in the State of Illinois.

Booth vs. People, 186 Ill. 43.
Booth vs. Illinois, 184 U. S. 425.

(f) We find analogous cases construing the Stamp Act passed by Congress in 1908, and among the leading cases are the following:

Nicol vs. Ames, 173 U. S. l. c. 516, *et seq.*
United States vs. Thomas, 115 Fed. Rep. l. c. 209, *et seq.*

Also analogous inheritance tax laws have been held valid by both Federal and State courts.

> In matter of Keeney, 194 N. Y. l. c. 285, *et seq.*
>
> Beers vs. Glynn, 211 U. S. 477.
>
> Michigan Central R. R. Co. vs. Powers, 201 U. S. l. c. 301.
>
> Knowlton vs. Moore, 178 U. S. 41.

Furthermore, the rule as to classification does not require absolute equality in taxation, even in the same class. Absolute equality in an excise or occupation license tax is a physical impossibility.

In the case of Magoun vs. Illinois Trust & Savings Bank, 170 U. S. l. c. 300, 301, the court said:

> "That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat 'all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding

> these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality, nevertheless they are universally imposed and their legality has never been questioned."

See Clark vs. Titusville, 184 U. S. l. c. 330, *et seq.*

III.

THE ACT DOES NOT INTERFERE WITH INTERSTATE COMMERCE AND IS NOT VIOLATIVE OF THE PROVISIONS OF SECTION 8 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES.

Plaintiffs in error further contend that the act under consideration is an interference with interstate commerce, and for that reason is void as being in conflict with the Federal Constitution.

(a) The Supreme Court of Missouri, in its opinion in this case, answered this objection in the negative, as follows:

> "This brings us to the consideration of the insistence on the part of the appellants that the statute now under consideration is illegal and invalid for the reason that it interferes with interstate commerce, and is therefore violative of the provisions of section 1, article 8 of the Constitution of the United States.
>
> "It is sufficient to say upon this proposition, after a most careful consideration of the subject, that in our opinion the license or stamp tax required by the statute involved in this proceeding upon sales made at the places and in the manner provided by the statute does not, even

in the remotest degree, interfere with interstate commerce. This subject was in judgment in the Supreme Court of the United States in the Hatch case. It was fully discussed by that court and all of the authorities applicable to the subject were fully considered, and the conclusion reached was that there was not a shadow of a ground for calling the transaction between the parties, in which a stamp tax was required upon a memoranda of sales, interstate commerce. The court said in that case, in treating of this subject, that 'the communications between the parties were not between different states, as in *Western Union Telegraph Co.* vs. *Texas,* 105 U. S., 460, and the bargain did not contemplate or induce the transport of property from one state to another, as in the drummer cases. *Rearick* vs. *Pennsylvania, supra.* The bargain was not affected in any way, legally or practically, by the fact that the parties happened to have come from another state before they made it. It does not appear that the petitioner came into New York to sell his stock. * * * It appears only that he sold after coming into the state. But we are far from implying that it would have made any difference if he had come to New York with the supposed intent before any bargain was made. * * * The fact that the property sold is outside of the state and the seller and buyer foreigners, are not enough to make a sale commence with foreign nations or among the several states, and that is all that there is here. On the general question there should be compared with the drummer cases the decisions on the other side of the line. *Nathan* vs. *Louisiana*, 8 How., 73; *Woodruff* vs. *Parham*, 8 Wall, 123; *Brown* vs. *Houston*, 114 U. S. 622; *Emert* vs. *Missouri*, 156 U. S. 296. A tax is not a constitutional regulation in every case where an absolute prohibition of sales would be one. *American Steel & Wire Co.* vs. *Speed*, 192 U. S. 500. We think it unnecessary to explain at greater length the reasons for our opinion that the petitioner has suffered no unconstitutional wrong."

It must not be overlooked that the license or stamp tax required by the statute involved in this proceeding is not a tax upon property, but is a requirement to place a twenty-five cent stamp upon the sale of property made in the manner and at the places provided for by such statute. In other words, it is a license or stamp tax upon a particular kind of contract when made in this State. This proposition confronted the New York court of appeals in the Hatch case, *supra*, and in treating of the subject of a stamp tax upon sales of certificate of stock, that court thus stated the law:

"The certificate itself is not liable for the tax, but the person selling it is. The tax is not a lien on certificates, nor on shares, which may be owned to any extent throughout the State, free from any claim under the statute in question. It is the sale alone that gives rise to the tax, which is imposed through the command of the law to the seller to pay the tax when the contract to sell is made, and it is enforced not by levy and sale, but by civil and penal remedies against the person of the seller. While this tax, the same as all other taxes, must ultimately come out of the property of the seller, it cannot be enforced against the certificate sold as distinguished from his other property.''

In further discusing that question it was said that ''jurisdiction over persons who make the contract does not depend on their residence, but on their presence within the State when the contract is made. Jurisdiction over property depends on its physical presence here, or if it is personal property, either its presence here or the residence of the owner here. * * * When two citizens of Connecticut come into this State and make a contract here, to be enforced here, both they and their contract are subject to its laws, and they are not only entitled to the protection thereof, but are under the same obligation to obey as if they were citizens. Such a contract is valid or invalid as our laws declare. When the law commands that if they, or any other person, whether residents or not, make a certain contract here they must pay a certain tax for the privilege; the command is personal, addressed to them as persons then within the State, and is as binding on them as if they resided in the State. Their rights and their obligations in reference to such a contract are the same as if they were citizens no greater and no less. The fact that the contract, though made here, may relate to property, real or personal, situated elsewhere, has no bearing upon the question. By coming into the State they subjected themselves to its laws and to its taxing power, so far as the making of such a contract is concerned.

It is immaterial whether the contract is between residents or non-residents, or between a resident and a non-resident, for if it is made within the State it is subject to taxation by the State.''

Manifestly the State has power within its territory to regulate all business done, and, as was said in *Matter of McPherson*, 104 N. Y. 3067:

''It has never been questioned that the legislature can impose a tax upon all sales of property, upon all incomes, upon all acquisitions of property, upon all business and upon all transfers.''

The requirements of the statute now under consideration have no bearing or influence whatever upon property sold. It is addressed to those furnishing the places as well as those who deal in the transaction in such places. In other words, in sales of property in the manner and at the places pointed out by the statute it is required, where a sale is made in the manner contemplated by that statute that the seller shall make a memoranda of such sale and place upon such memoranda a twenty-five cent stamp. We repeat, that transactions of this character have no influence whatever upon commerce between different states, and, as was in substance said by the Supreme Court of the United States, sales of this character do not contemplate or have anything to do with the transportation of property from one state to another, as in the drummer cases, and the mere fact that the parties to such sale, or either one of them happens to be a resident of another state, in no way, legally or prac-

> tically, affects the transaction and falls far short of subjecting such transaction to condemnation for the reason that it interferes with interstate commerce. Our conclusion upon this proposition is that this statute in no way interferes with interstate commerce and should not be held invalid for that reason." (Rec. pp. 43-45.)

(b) The New York Court of Appeals in the Hatch case, ***supra,*** (l. c. 448, *et seq.*) answered this contention in the negative, as follows:

> "It is insisted that a tax on the transfer of stock certificates, issued by a foreign corporation and owned by a non-resident, although made within this State, is virtually a tax on property without the jurisdiction of the State.
>
> This position is founded on the theory that the shares of capital stock of a corporation represents its property, and if that property is not within the State the shares are not taxable here unless the owner resides here. The tax, however, is not on property, but on the sale of property, or on a particular kind of contract when made within this State. The certificate, itself, is not liable for the tax, but the person selling it is. The tax is not a lien on certificates, nor on shares, which may be owned to any extent throughout the State, free from any claim under the statute in question. It is the sale alone that gives rise to the tax, which is imposed through the command of the law to the seller to pay the tax when the contract to sell is made, and it is enforced not by levy and sale, but by civil and penal remedies against the person of the seller. While this tax,

the same as all other taxes, must ultimately come out of the property of the seller, it cannot be enforced against the certificate sold as distinguished from his other property.

The question is whether the State has jurisdiction to impose a tax on a certain class of contracts when made within its territorial limits? Jurisdiction over the persons who make the contract does not depend on their residence, but on their presence within the State when the contract is made. Jurisdiction over property depends on its physical presence here, or if it is personal property, either its presence here or the residence of the owner here. The fiction of the common law, *mobilia sequuntur personam*, has no foundation in the Constitution and does not control the legislature, which rejects or adopts it at will, as applied to the subject of taxation. When two citizens of Connecticut come into this State and make a contract here, to be enforced here, both they and their contract are subject to its laws, and they are not only entitled to the protection thereof, but are under the same obligation to obey as if they were citizens. Such a contract is valid or invalid as our laws declare. When the law commands that if they, or any other person, whether residents or not, make a certain contract here they must pay a certain tax for the privilege; the command is personal, addressed to them as persons then within the State, and is as binding on them as if they resided in the State. Their rights and their obligations in reference to such a contract are the same as if they were citizens, no greater and no less. The fact that the contract, though made here, may relate to property, real or personal, situated elsewhere, has no bearing upon the question. By coming into the State they subjected themselves to its laws and to its taxing power, so far as the making of such a contract is concerned. It is immaterial whether the contract is between residents or non-residents, or between a resident and a non-resident, for if it is made within the State it is subject to taxation by the State.

This necessarily follows from the power of the State over the subject of taxation. It has power to tax all property within its territory, all business done and all contracts made within that territory, provided they are not protected as Federal agencies, whether the property is owned or the business is done or the contracts are made by residents or non-residents. 'It has never been questioned that the legislature can impose a tax on all sales of property, upon all incomes, upon all acquisitions of property, upon all business and upon all transfers.' (Matter of McPherson, 104 N. Y. 306, 317.)

We think such specific or excise taxes are laid upon privileges rather than on property. (Orr vs. Gilman, 138 U. S. 278, 289; Clark vs. Titusville, 184 U. S. 329; Thomas vs. United States, 192 U. S. 363; Foppiano vs. Speed, 199 U. S. 501, 520.) This was distinctly held in the Thomas case, and necessarily so held, for if a tax on certificates is a tax on property it is a direct tax requiring apportionment 'among the several states, * * * according to their respective numbers.' (Art. 1, Sec. 2, par. 3.) But, even assuming that a tax on the sale of property is, in effect, a tax on the property itself, what are certificates of stock and how may they be treated by the State for the purpose of taxation? They may be treated as property from the function they perform and the use that is made of them. They may well be regarded as a distinct species of property, for they now represent the bulk of property in the State and are the universal medium of transfer. As we said in a recent case: 'The main use of certificates is for convenience of transfer, and they are treated by business men as property for all practical purposes. They are sold in the market, transferred as collateral security to loans and are used in various ways as property. They pass by delivery from hand to hand, are the subject of larceny and are taxable generally in this State.' (Matter of Whiting, 150 N. Y. 27, 30.) Although issued by a foreign corporation and owned by a non-resident, if they are found within the State they may be seized under a warrant of attachment. (Simpson vs. Jersey City Contracting Co., 165 N. Y. 193.) Speaking of the nature of a share of stock, Mr. Justice Nelson declared it to be 'a distinct, independent interest or property, held by the stockholder like any other property that may belong to him, and, of course, subject to like taxation.' (People vs. Com'r, 4 Wall. 244, 258.) And in another case it was said: 'Shares of stock may be within a state and the property of the corporation outside of it.' (Kidd vs. Alabama, 188 U. S. 730, 733.)

The following authorities, we think, sustain the contention of defendant in error:

People ex rel. Hatch vs. Reardon, 204 U. S. *supra.*
Standard Oil Co. vs. Tennessee, 217 U. S. 413.
Ware & Leland vs. Mobile County, 209 U. S. 405.
Ware vs. Mobile County, 146 Ala. 163.
Pittsburg & Coal Co. vs. Louisiana, 156 U. S. 590.
Plumley vs. Massachusetts, 155 U. S. l. c. 473.
Alexander vs. State, 86 Ga. 246.

IN CONCLUSION.

Now let us briefly analyze the act under consideration. It makes it unlawful for any corporation, association, copartnership or person to keep, or cause to be kept, in the State of Missouri, any office, store or other place, wherein is permitted the buying or selling of shares of stock or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, either on "margins" or otherwise, where the same is not at the time actually paid for and delivered, unless the seller at the time of such sale shall cause to be made a complete record of the things sold, the name of the purchaser and the time of delivery, in a book kept for that purpose, and at the same time—that is the time of sale and the making of the memoranda—the seller shall deliver to the purchaser a written or printed memoranda of said sales, and on which written or printed memoranda the seller shall place, or cause to be placed, a stamp of the value of twenty-five cents, and which stamp the seller is required to purchase from the State Auditor, and have on hand at the time of making such sale.

In other words, the act in its last analysis provides:

1. That a written or printed memoranda of all sales of

corporation stock, bonds, petroleum, cotton, grain, provisions or other commodities, when not delivered and paid for at the time of sale, shall be made by the seller, when sold, on what is known as "margins" or "futures," and on such memoranda of such sales the seller shall cause to be placed a twenty-five cent stamp, purchased from the State Auditor for that purpose.

2. The act places all corporations or persons making sales of said articles on "margins," when not delivered and paid for at the time of sale, in one class.

3. The act further requires that a twenty-five cent stamp shall be placed on the written or printed memoranda of each sale of said articles made on "margins" when not delivered and paid for at the time of sale.

We say the classification by the legislature of all sales of the said named articles on "margins" is a reasonable one. Classification of sales on "margins," or what is most commonly called "futures," is not an arbitrary one. There is much good reason to have a record made of such sales as a police regulation.

Defendant in error respectfully submits that the judgment of the Supreme Court of Missouri, in holding said act valid, should be affirmed.

All of which is respectfully submitted.

ELLIOTT W. MAJOR,
Attorney-General of Missouri.
JOHN M. ATKINSON,
Assistant Attorney-General of Missouri,
Attorneys and Counselors for Defendant in Error.

APPENDIX.

AN ACT making it unlawful for any corporation, co-partnership or person to buy or sell, for future delivery, stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, without at the time delivering or receiving a written memoranda with a stamp purchased of the state auditor, and to provide a road fund, and to prescribe the manner of its distribution; and providing penalties for the violation thereof.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. It shall be unlawful for any corporation, association, co-partnership or person to keep, or cause to be kept, in this State, any office, store or other place wherein is permitted the buying or selling the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, either on margins or otherwise, where the same is not at the time actually paid for and delivered, without at the time of the sale the seller shall cause to be made a complete record of the thing sold, the purchaser and the time of delivery in a book kept for that purpose; and at the time the seller shall deliver to the purchaser a written or printed memoranda of said sale, on which he shall place, or cause to be placed, a stamp of the value of twenty-five cents, which the seller shall purchase of the state auditor, and have on hand before making such sale; and it shall be the duty of the state auditor, upon the passage of this act, to have printed or engraved stamps for this purpose, of such design as he may select; and on application and payment for said stamps, to immediately furnish the same to the applicants applying therefor: Provided, further, that it shall be unlawful for the purchaser to receive the memoranda aforesaid until it bears the stamp above provided for.

Sec. 2. The fund arising from the sale of the stamps provided for in section one of this act shall, in the hands of the state auditor, constitute a road fund; and it shall be the duty of the said auditor to distribute said fund, annually, to the counties in the state and the city of St. Louis, in the same proportion and in like manner as the state school funds are now distributed by him.

Sec. 3. Any person, whether acting individually or as a member, or as an officer, agent or employe of any corporation, association or co-partnership, who shall be guilty of violating any of the provisions of section one, shall, upon conviction thereof, be fined in any sum not less than fifty, nor more than one thousand dollars, and in addition thereto may be imprisoned in the county or city jail for a period of not less than thirty days, nor to exceed one year.

Approved March 8, 1907.

(Missouri Session Acts 1907, pp. 392-3.)

Missouri Revised Statutes, 1909, sections 10228, 10229, 10230.

V

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

R. J. HOUSE,
Plaintiff in Error,
v.
JOEL B. MAYES, Marshal of Jackson County, Missouri, and ELLIOTT W. MAJOR, Attorney General,
Defendants in Error.
No. 597.

THOMAS J. BRODNAX and FRANK E. ESSEX,
Plaintiffs in Error,
v.
THE STATE OF MISSOURI,
Defendant in Error.
No. 598.

Motion by Both Parties to Advance Causes.

Now come plaintiffs in error and defendants in error in each of the above cases, including the real party in interest, the state of Missouri by its attorney general, and respectfully jointly move the court to advance each case for these reasons:

1. The legislature of Missouri passed an act, approved June 8, 1909 (Laws Mo., 1909, p. 519), requiring grain, seed, hay and coal to be sold by actual weight, and prohibiting as a misdemeanor, a deduction of anything from the actual weight or measure there-

of under claim of right so to do by any custom or rule of a board of trade or any pretense whatsoever. In 1907 (Laws Mo., 1907, p. 392), the legislature passed an act requiring all sales of corporate stocks and bonds and of petroleum, cotton, grain and provisions, not at the time actually paid for and delivered, to be evidenced by a writing bearing a twenty-five cent stamp. The act made it a misdemeanor to keep a place wherein was permitted such sales.

2. The Board of Trade of Kansas City, Missouri, and the Merchants Exchange of St. Louis, Missouri, are commercial and trading organizations upon the floors of which are carried on the most tremendous grain business of the Mississippi and Missouri river valleys. The members thereof claim the right, among themselves, to make a deduction in weight to cover alleged losses upon account of dirt and foreign matter which accumulates in the course of transit. Some idea of the extent of a year's business is obtained from this compilation made by the secretary of the Kansas City Board of Trade of the receipt thereat for the year ending June 30, 1910: Wheat, 36,608,000 bushels; corn, 16,533,550 bushels; oats, 5,660,500 bushels; rye, 101,200 bushels; barley, 385,000 bushels; flax, 98,000 bushels; kaffir corn, 714 cars; flour, 158,500 barrels; bran, 20,240 tons; hay, 232,368 tons.

3. Case No. 597 was a test case instituted below by *habeas corpus* (proper practice in the state for the purpose) to determine the validity of the first mentioned act of 1909. The court below, by a vote of four to three (*House* v. *Mayes*, 127 S. W. Rep., 304) upheld the act against the contention that it violated the fourteenth amendment to the constitution, in unreasonably abridging contractual rights, denying the right to petitioner to a discharge.

4. Case No. 598 was a test case instituted to have determined the validity of the stamp tax act of 1907. The supreme court of Missouri affirmed the conviction of plaintiffs in error for a viola-

tion of said act and upheld its validity, one judge dissenting (*State* v. *Brodnax,* 128 S. W. Rep., 177) in favor of the contentions of the plaintiffs in error that it was an attempt to regulate interstate commerce, contrary to section eight, article one of the United States constitution, and was discriminatory, and unreasonably interfered with the freedom of contract, contrary to the fourteenth amendment thereto.

5. Sales upon an exchange are in a measure for future delivery and of grain which is, has been, or will be in transit, so that these laws in some degree affect all the daily transactions upon the great grain exchanges of Missouri.

6. The question in each case is one of such vast importance to the state and to all those who buy or sell grain, and so affects the daily transactions upon the great grain exchanges of the state, that it is the judgment of both parties that each case should be advanced to a speedy hearing. They therefore so request. Each is a criminal case to which the state is a party (Section 949, Rev. Sts. U. S.), and the subject of advancement. If necessary to obtain that result, the parties consent that the two causes may be set for argument at the same time, with the same force and effect as if all the questions were presented by one record.

FRANK HAGERMAN,
Attorney for Plaintiffs in Error.

ELLIOTT W. MAJOR,
Attorney General of the State of Missouri.

IN THE

SUPREME COURT OF THE UNITED STATES.

Supreme Court U. S.
FILED
NOV 25 1910
JAMES H. McKENNEY,
Clerk.

THOMAS J. BRODNAX and FRANK E. ESSEX,
Plaintiffs in Error,
v.
THE STATE OF MISSOURI,
Defendant in Error.

No. 598

In Error to the Supreme Court of the State of Missouri.

BRIEF FOR PLAINTIFFS IN ERROR.

KIMBROUGH STONE,
FRANK HAGERMAN,
Attorneys for Plaintiff in Error.

[illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS J. BRODNAX and FRANK E. ESSEX,
Plaintiffs in Error,
v.
THE STATE OF MISSOURI,
Defendant in Error.

No. 598.

In Error to the Supreme Court of the State of Missouri

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

1. THE CASE FOR REVIEW.

This proceeding seeks to reverse the action of the Supreme Court of Missouri (*State* v. *Brodnax*, 128 S. W. Rep., 177) in affirming, by a divided court, a judgment of conviction rendered by the Criminal Court of Jackson County, Missouri, for the violation of an act of the state legislature (Laws Mo., 1907, p. 392) commonly known as the "Stamp Act."

2. THE ACT.

The legislature of Missouri passed an act (Laws Mo., 1907, p. 392) in substance providing that:

(a) No one should keep, or cause to be kept, a place wherein was permitted the buying or selling of corporate bonds or stocks, petroleum, cotton, grain, provisions or other commodities, either on margins or otherwise, where the same was not, at the time, actually paid for and delivered, unless at the time of the sale the seller should cause to be made, in a book kept for that purpose, a complete record showing the thing sold, the name of the purchaser and the time of delivery (Sec. 1). (b) Every such seller, at such place, should deliver to the purchaser a written memorandum of sale, bearing a twenty-five cent stamp to be provided and sold to him by the state auditor (Sec. 1). (c) No such purchaser should receive such written memorandum unless it was so stamped (Sec. 1). (d) The funds arising from the sales of the stamps should be used and distributed as a state road fund (Sec. 2). (e) Every person violating the provisions of the act should be guilty of a misdemeanor, and punished by a fine in addition to which imprisonment might be added (Sec. 3).

It thus appears from the act that: The *keeper* of such a place where sales were made without cash being paid and delivery made, was guilty only when at the time of the sale a complete record thereof was not kept by the *seller;* the guilt of the *seller* consisted in failing to deliver a written memorandum of sale duly stamped; the *purchaser's* guilt depended alone upon the receipt of the written memorandum without a stamp. For the enforcement of the act the state was to depend alone upon the coercion which came from the threatened imposition of the fines and imprisonment. No provision was made for the collection of the tax from either person or property.

3. THE CHARGE.

The indictment (Rec. 3) charged plaintiffs in error, as officers and agents of the Kansas City Board of Trade, with keep-cash and making delivery and where such record was not kept by the seller, all that the statute required in defining the offense. It unnecessarily added the averment that sales were there made without stamped memoranda, something not an element in the offense of the keeper but pertaining alone to the guilt of the seller and purchaser.

4. THE PROOF.

The proof consisted (Rec. 10) of an agreed statement of facts reciting that plaintiffs in error, as such officers and agents, kept a place, i. e., the trading floor of the exchange, where were made sales upon margins and otherwise, of grain, provisions and other commodities, without their being both actually paid for and delivered at time of the sale, and where a written stamped memorandum was not at the time of the sale, by the seller delivered to the purchaser; a substantial part of such sales being of properties which, at the time, were in course of transportation as articles of interstate commerce.

The statute made a necessary element of the *keeper's* guilt the failure of the *seller*, not the *keeper*, to make a record of the sale in a book kept by him for that purpose. The agreed facts, however, made no pretense that there was any such failure so that the conviction was, in any view of the case unwarranted, except upon the theory that the state could and did declare to be a crime the keeping of a place where were made sales of lawful commodities, without, *at the time of sale, there being both* actual delivery and payment of the purchase price.

5. FEDERAL QUESTIONS INVOLVED.

Plaintiffs in error, unsuccessfully, by demurrer (Rec. 6), objections (Rec. 7) to the introduction of evidence and requests (Rec. 8) for declarations of law, presented, among others, the propositions which the Supreme Court of Missouri noticed and decided (Rec. 30-46) that the law was invalid because:

> "1. The statute under which this proceeding is instituted is discriminatory, abridges the privileges and immun-

ities of citizens of the United States, deprives defendants of their property without due process of law, and denies to them the equal protection of the law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

2. The statute under which the proceeding is instituted is an unwarranted attempt to regulate interstate commerce and is violative of Section 8, Article I of the Constitution of the United States."

6. OPINION BELOW.

Judge Fox, over the dissent of Judge Graves (Rec., 30-46, 128 S. W. Rep., 177, 186), with Judge Woodson not sitting, delivered the opinion of the court below, holding that:

(a) The act was not in conflict with the state constitution for that:

First. While its purpose was to raise revenue, it did not levy a direct tax upon property which would have made it void because not uniform nor proportioned according to value or amount, the state constitution requiring all taxes upon property to be uniform (Art. 10, Sec. 3) and to be levied in accordance with value (id. Sec. 4).

Second. The purpose of the act was to raise revenue by the levy of a tax upon each sale made which was one on the privileges of making it and therefore the tax was really for the facilities furnished as in *Nicol* v. *Ames*, 173 U. S., 509, 43 L. Ed. 786. Although the title of the act made it unlawful to buy or sell, its body created the offense of keeping the place, a provision inserted solely for the purpose of *assistance* in its enforcement against buyer or seller, the main purpose of the law being to reach them. Hence, there was no violation of that provision of the state constitution (Art. 4, Sec. 28) requiring each subject of an act to be clearly expressed in the title.

(b) The act being one to raise revenue through means of a license or tax on the privilege of making each sale at the places designated, was not discriminatory within the meaning of the fourteenth amendment, because it made and defined a distinct class of transactions, the assumption being made that the court was bound by the decisions here made in *Nicols* v. *Ames*, 173 U. S. 509, 43 L. Ed. 786, holding that a stamp tax upon all sales made at an exchange was valid, and in *Otis* v. *Parker*, 187 U. S. 606, 47 L. Ed. 323, holding that it was within the power of the state to classify sales upon margins and prohibit them entirely, which being so, it necessarily followed that they could be regulated through the means of a stamp tax.

(c) Not being a tax upon property sold, but being merely one upon the privilege of and facilities for making each sale, it was wholly immaterial that such property was at the time in the actual course of transportation as an article of interstate commerce. Hence, there was no regulation of interstate commerce within the meaning of section 8, article 1, of the Constitution, the court regarding the reasoning of the New York Court of Appeals in *People ex rel. Hatch* v. *Reardon*, 184 N. Y. 431, 77 N. E. Rep., 970, as conclusive upon this question, because that case had been here affirmed (204 U. S. 152, 51 L. Ed. 415), overlooking the fact that the opinion of Mr. Justice Holmes here did not adopt that reasoning, but placed the decision here solely upon the ground that the articles there sold were actually in the state at the time and that plaintiff in error was not in a situation to raise the question as he had not attempted to make any transfer connected in anywise with interstate traffic.

7. Errors Assigned.

The errors assigned (Rec., 52) are, of course, confined to the federal questions that the court below erred in holding that the act was not discriminatory within the meaning of the fourteenth amendment, and that it did not so directly affect interstate commerce as to be violative of section 8 of article 1 of the constitution.

BRIEF OF THE ARGUMENT.

I.

The act cannot be separated into parts but must be considered as a whole.

The view of the state court was that it was intended by the act to cover *all* transactions at the exchanges, offices and markets in the state where cash was not, *at the time of the sale,* actually paid, and the property *at the same time* actually delivered; this too whether or not the property was in the course of interstate transit or actually located within the state, thus compelling property outside of the state, subject to barter and sale at these places, if then bought or sold, to be actually delivered at the time and place of sale. It is manifest that the act would never have been passed if it had covered a *part* only of the transactions at which it struck. In these circumstances the law must stand or fall as a whole. That such is the rule of this court is reasonably plain.

As said (*U. S.* v. *Ju Toy,* 198 U. S., 253, 262; 49 L. Ed., 1040, 1044) by Mr. Justice Holmes:

> "An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again."

In *U. S.* v. *Reese*, 92 U. S., 214, 222, 23 L. Ed., 563, 566, Mr. Chief Justice Waite said:

> "We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutionl, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the

> section, but by inserting those that are not there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific when, as expressed, it is general only. * * * To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

This case was approved, and the foregoing language quoted in *Trade Mark Cases,* 100 U. S., 82, 98-99; 25 L. Ed., 550, 553, where Mr. Justice Miller added:

> "If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely: Make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under state law."

These cases were followed and applied in *Allen* v. *Louisiana,* 103 U. S., 80; 26 L. Ed., 318, and *Baldwin* v. *Franks,* 120 U. S., 678, 685-689; 30 L. Ed., 766, 768-769. They were also followed in *Poindexter* v. *Greenhow,* 114 U. S., 270, 305; 29 L. Ed., 185, 197, where Mr. Justice Matthews said:

> "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these cases are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare, that the intention of the legislature was that the part pronounced valid should be enforcible even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact. An illustration of this principle is found in *Trade Mark Cases,* 100 U. S., 82 (Bk. 25, L. Ed., 550), where an act of Congress, which, it was claimed, would have been valid as a regulation of commerce with foreign nations and among

> the states, was held to be void altogether because it embraced all commerce, including that between citizens of the same state, which was not within the jurisdiction of Congress, and its language could not be restrained to that which was subject to the control of Congress."

There was a thorough review and application of the foregoing cases recently, when the secretary of agriculture made a quarantine order in general language not excepting intra-state transportation. Mr. Justice Day (*Ill. Cent. Ry. Co.* v. *McKendree*, 203 U. S., 514, 529; 51 L. Ed., 298, 304) said:

> "The terms of order 107 apply to all cattle transported from the south of this line to parts of the United States north thereof. * * * It is urged by the government that it was not the intention of the secretary to make provision for intra-state commerce, as the recital of the order shows an intention to adopt the state line, when the state by its legislature has passed the necessary laws to enforce the same completely and strictly. But the order in terms applies alike to interstate and intra-state commerce. * * * Nor have we the power to so limit the secretary's order as to make it apply only to interstate commerce, which it is urged is all that is here involved. For aught that appears upon the face of the order, the secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. The order is in terms single and indivisible."

The subject was again involved in considering the Employer's Liability Act (*Howard* v. *Ill. Cent. R. Co.*, 207 U. S., 463, 500, 52 L. Ed., 297, 310), and Mr. Justice White for a majority of the court, said:

> "So far as the face of the statute is concerned, the argument is this: That because the statute says carriers engaged in commerce between the states, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business, and none other of such carriers, and that the words 'any employee,' as found in the statute, should be held to mean any employee when such employee is engaged only in interstate commerce. But this would require us to write into the statute words of limitation and restriction not found in it. * * * Concluding, as we do, that the

statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the constitution, and non-enforcible."

So the state court has frequently held that where the unconstitutional portions of a statute are so indissolubly connected with the constitutional portions that they cannot be eliminated so as to leave the valid portion remaining in operative force, then the whole statute must fall. (*State* v. *Bockstruck*, 136 Mo., 335; *St. Louis* v. *St. Louis R. R.*, 14 Mo. App., 221; s. c., 89 Mo., 44; *State ex rel.* v. *Field*, 119 Mo., 593; *State* v. *Kring*, 74 Mo., 612.) These principles should be borne in mind because the act deals with certain sales upon "margins or *otherwise*," and with sales for future delivery and upon credit, so that it could not be applied to one and not to the other; to sales of corporate bonds and stocks, petroleum, grain and provisions, so that it could not be upheld as to sales of one of these classes or articles and annulled as to the others. So it covers the sales of all commodities located in the state and delivered at the place of sale as well as those in and to be put in interstate transportation and not there deliverable. It could not be sustained as to one and be held void as to the other. Its sole method of enforcement is by the criminal law. Omit the criminal features and there is no law left. With these observations we turn to the law to see whether as a *whole* it can be sustained.

II.

The act, an analysis thereof, and its construction below.

(a) The act (Laws Mo., 1907, p. 392) reads:

"An act making it unlawful for any corporation, copartnership or person to buy or sell, for future delivery, stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, without at the time of delivering or receiving a written memoranda with a stamp purchased of the state auditor and to provide a road fund, and to prescribe the manner of its distribution; and providing penalties for the violation thereof.

Be is enacted by the General Assembly of the State of Missouri, as follows:

Section 1. It shall be unlawful for any corporation, association, co-partnership or person to keep, or cause to be kept, in this state, any office, store or other place wherein is permitted the buying or selling the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, either on margins or otherwise, where the same is not at the time actually paid for and delivered, without at the time of the sale the seller shall cause to be made a complete record of the thing sold, the purchaser and the time of delivery in a book kept for that purpose; and at the same time the seller shall deliver to the purchaser a written or printed memoranda of said sale, on which he shall place, or cause to be placed, a stamp of the value of twenty-five cents, which the seller shall purchase of the state auditor, and have on hand before making such sale; and it shall be the duty of the state auditor, upon the passage of this act, to have printed or engraved stamps for this purpose, of such design as he may select; and on application and payment for said stamps, to immediately furnish the same to the applicants applying therefor: Provided, further that it shall be unlawful for the purchaser to receive the memoranda aforesaid until it bears the stamp above provided for.

Sec. 2. The fund arising from the sale of the stamps provided for in section one of this act shall, in the hands of the state auditor, constitute a road fund; and it shall be the duty of the said auditor to distribute said fund, annually, to the counties in the State and the City of St. Louis, in the same proportions and in like manner as the State school funds are now distributed by him.

Sec. 3. Any person, whether acting individually or as a member, or as an officer, agent or employe of any corporation, association or co-partnership who shall be guilty of violating any of the provisions of section one, shall, upon conviction thereof, be fined in any sum not less than fifty, nor more than one thousand dollars, and in addition thereto may be imprisoned in the county or city jail for a period of not less than thirty days, nor to exceed one year.

Approved March 8, 1907."

(b) It is plain that the act is not limited to all sales of any particular commodity, nor to sales upon margins, nor to the general right to deal at markets or upon the trading floors of exchanges, nor to all transactions there made. The sales sought to be reached are those of particular things, i. e., corporate bonds and stocks, petroleum, cotton, grain and provisions. The words "other commodities" used in the act are, according to rules prevailing in Missouri (*Laughlin* v. *St. Louis*, 49 Mo., 559; *State* v. *Schuchmann*, 133 Mo., 111, 119, 120), limited to the character of property specifically mentioned. The tax reaches only such of these sales as are made at certain places. Even then it is not limited to *all* such sales there made, but only to sales which are there made upon credit and without delivery.

(c) No provision is made for the collection of the tax from any person or property. For its enforcement, reliance must be placed solely upon the coercion flowing from the criminality involved in a violation of its terms. The keeper is not guilty for any act of his own. His guilt depends wholly upon the act of another, i. e., the seller, who must, before the keeper can be found guilty, fail to keep a certain record. The seller's guilt depends upon his failure to deliver to the buyer a stamped memorandum of the sale. That of the purchaser depends alone upon his receipt of the memorandum without the stamp. No provision being made for the collection of the tax from persons or property, the sole remedy for its enforcement is, as already stated, coercion through fear of criminal prosecutions. This because the right to enforce the tax in Missouri must wholly depend upon a specific statutory provision therefor (*Carondelet* v *Picot*, 38 Mo., 125; *State ex rel.* v. *Goodnow*, 80 Mo., 271; Cooley on Taxation, 3rd Ed., 18, 19).

(d) The fair construction of the act is to say that it levied no tax, but attempted to raise revenue by dealing with keeper, buyer and seller solely as a police regulation. The exercise of the police power may be solely for the purpose of raising revenue in Missouri where (*Carthage* v. *Rhodes*, 101 Mo., 175, 177, 178), it has been said:

> "Taxation may be for the purpose of raising revenue, or for the purpose of regulation; where for the purpose of regulation it is an exercise of the police power of the state."

So as said in Gray on Limitations on Taxing Power, section 1404:

> "The production of revenue does not necessarily stamp the measure as an exercise of the taxing power."

This subject will be hereinafter more fully considered.

III.

As against the keeper, as each plaintiff in error was, this act must, if at all, be sustained as a police regulation, and as such it is void because interfering with the liberty of contract and because it is discriminatory.

(a) Since the keeper of the place is not called upon to pay the tax, and no proof is or was offered that a record of the sales was not kept by the seller, the law not requiring the keeper so to do, the case as to the latter must resolve itself into this: Can a state, in the face of the fourteenth amendment, prohibit one from keeping a place where lawful commodities are sold without, at the time of sale, being actually delivered and actually paid for? All that may be said as to the right to control options upon futures or sales upon margins is immaterial. This act is not limited to the great exchanges where the use of facilities of great value is obtained, as was the case in *Nicol* v. *Ames*, 173 U. S., 509, 43 L. Ed., 786, nor even to *all* sales thereat. Moreover, guilt exists if the commodity be not actually paid for, or if delivery be not made. There was no attempt to reach alone sales upon margins, nor to deal with options for future delivery, which are peculiar transactions involving dangers and necessities for public protection justifying legislative prohibition or regulation (*Otis* v. *Parker*, 187 U. S., 606, 46 L. Ed., 323). If the tax be sustained because of the facilities furnished as in *Nicol* v. *Ames*, 173 U. S., 509, 43 L. Ed., 786, then it should be laid alike upon all who use the same. This would include those selling for cash and credit, with or without delivery.

(b) The fourteenth amendment secures to everyone the right to carry on a business and to make all contracts needful for the purpose (*Allgeyer* v. *Louisiana*, 165 U. S., 578, 589, 41 L. Ed., 832, 835, 836; *Holden* v. *Hardy*, 169 U. S., 366, 390, 42 L. Ed., 780, 790; *Lochner* v. *New York*, 198 U. S., 45, 53, 49 L. Ed., 937, 940; *Adair* v. *U. S.*, 208 U. S., 161, 172, 173, 52 L. Ed., 436, 442). The right to contract is of no value if there be no power to extend credit, nor if one to buy or sell must have immediate delivery. Here the act not only provides that delivery must actually be made, but the cash must be forthcoming at the time of the sale. The commerce of a nation depends upon the extension of credit. Without it no business can be done, banks would cease to exist and merchants close their doors. To prohibit one from engaging in a lawful business upon credit, is as plain an interference with the individual rights as can be imagined. Likewise as to the requirement of actual delivery. The grain of the west could not be handled if actual delivery had to be made at the time of its sale. So the question reduces itself to the proposition whether such interference is a proper exercise of the police power.

(c) The police power of the state cannot be exercised unreasonably nor in an arbitrary manner, and whether it has been or not is also a question solely for the courts (*Lochner* v. *New*

York, 198 U. S., 45, 56, 57, 49 L. Ed., 937, 940; *Adair* v. *U. S.*, 208, U. S., 161, 172, 173, 52 L. Ed., 436, 442.)

This subject has been considered in *House* v. *Mayes*, No. 597, submitted at the same time as this case and it may be left with the discussion there made.

(d) However, the act, even if sustainable under the police power as against the liberty of contract, is, as to the keeper, clearly discriminatory in that it does not deal with all transactions at the place in question, nor even with all transactions of any reasonable class. It permits the keeping of the place if, when the sales are made, there is actual delivery and the payment of cash, but conditionally prohibits it unless both be done. Delivery may be made, yet the extension of credit makes a crime. Cash may be paid, yet a contract between others for subsequent delivery makes a criminal out of seller, buyer, and keeper of the place. The same persons may make the same contracts for the same commodities at the same prices, yet the payment of cash, extension of credit, delivery or non-delivery determines his guilt or innocence. This is discrimination under the fourteenth amendment.

(e) That the act considered as a police regulation is discriminatory cannot be doubted. There is no room for argument upon the question in view of the principles heretofore announced by this court. (*Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S., 150, 41 L. Ed., 666; *Cotting* v. *Godard*, 183 U. S., 79, 46 L. Ed., 92; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, 46 L. Ed., 679.) The Missouri court has upon this subject spoken just as strongly. (*State* v. *Loomis*, 115 Mo., 307, 314; *State* v. *Julow*, 192 Mo., 163, 177, 178; *State* v. *Walsh*, 136 Mo., 400, 405, 406; *State* v. *Mikisek*, 225 Mo., 561, 577.)

In *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S., 150, 155, 157, 159, 165, 41 L. Ed., 666, 668, 669, 672, this court held to be discriminatory a law taxing an attorney's fee against railway corporations not paying certain claims within a given time. A most thorough review of the case was made, Mr. Justice Brewer, among other things saying:

> "* * * yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other. * * * But arbitrary selection can never be justified by calling it classification. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

In *Cotting* v. *Godard*, 183 U. S., 79, 111, 112, 46 L. Ed., 92, 109, 110, a law was held discriminatory which fixed the rates to be charged stock yards doing a certain amount of business. Mr. Justice Brewer, among other things, quoted from *State* v. *Hahn*, 61 Kan., 146, 153, 154, 59 Pac. Rep., 340, condemning a law applicable only to corporations employing ten or more persons, these words:

"'A classification of the kind attempted makes a distinction between corporations identically alike in organization, capital and all other powers and privileges conferred by law. It is arbitrary and wanting in reason. The act in question is class legislation of the most pronounced character.'"

He then added:

"So we have the clear declaration of the supreme court of Kansas that legislation by which one individual, or even one set of individuals, is selected from others doing the same business in the same way, and subjected to regulations not cast upon them, is a discrimination forbidden by the constitutional provision which obtains both in the constitution of Kansas and in that of the United States, to the effect that the equal protection of the laws is guaranteed to all. May we not rightfully accept this declaration of law by the highest tribunal of the state by whose legislature the act in question was passed, and, accepting the reasoning of that decision, does it not follow that, if an act which provides certain regulations for corporations employing ten or more laborers, and leaving corporations employing less than that number free from such regulations, is an unjust discrimination and a denial of the equal protection of the laws, an act which imposes regulations upon corporations doing business over a certain amount, and leaving all corporations doing a like business less than that amount free from such regulations, is equally obnoxious to constitutional prohibition?"

He finally said:

"But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. There can be no pretense that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements and the only difference is that one does more business than the other. But the receipt of an extra 2 head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a state may regulate one

> who does much business, while not regulating another who does the same but less business, then all significance in the guaranty of the equal protection of the laws is lost, and the door is opened to the inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, 560, 564, 46 L. Ed., 679, 690, 691, 692, the Illinois anti-trust act was held discriminatory because it excluded from its terms agricultural products and live stock in the hands of the producer or raiser. Mr. Justice Harlan, after a review of the books, among other things said:

> "The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect of which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this.' * * * We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the state for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill, or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

In *State* v. *Loomis*, 115 Mo., 307, 315, Judge Black said:

> "There can be no doubt but the legislature may regulate the business of mining and manufacturing so as to secure the

> health and safety of the employes, but that is not the scope of the two sections of the statute now in question. They single out those persons who are engaged in carrying on the pursuits of mining and manufacturing, and say to such persons, you cannot contract for labor payable alone in goods, wares and merchandise. The farmer, the merchant, the builder and the numerous contractors employing thousands of men may make such contracts but you cannot. They say to the mining and manufacturing employes, though of full age and competent to contract, still you shall not have the power to sell your labor for meat and clothing alone as others may. It will not do to say these sections simply regulate payment of wages, for that is not their purpose. They undertake to deny to the persons engaged in the two designated pursuits the right to make and enforce the most ordinary every-day contracts—a right accorded to all other persons. This denial of the right to contract is based upon a classification which is purely arbitrary, because the ground of the classification has no relation whatever to the natural capacity of persons to contract."

In condemning as discriminatory an act prohibiting the employers of certain laborers from interfering with their joining a trade union (*State* v. *Julow*, 129 Mo., 163, 177), Judge Sherwood said:

> "The legislature may legislate in regard to a class of persons, but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes, and enact different rules for the government of each. This would be mere arbitrary classification without any basis of reason on which to rest and would resemble a classification of men by the color of their hair or other individual peculiarities, something not competent for the legislature to do."

In *State* v. *Walsh*, 136 Mo. 400, 405, in holding an anti-pool selling law to be discriminatory, Judge Sherwood said:

> "That it is such a law is demonstrated by the fact that it takes bookmakers, pool sellers and betmongers as a class, and divides them into two portions, one of which, to-wit, that portion which assembles *'on the premises or within the limits or inclosure of a regular race course,'* and renders the

> members of that portion immune from punishment, while another portion of the same *genus*, bookmaker, pool seller or betmonger who pursues his avocation outside or immediately outside of the sacred precincts of 'a regular race course,' is doomed for doing the very same things to fine or imprisonment or both. * * * In the last case cited, it was ruled that while the legislature might legislate in regard to a class of persons, yet that they would not be permitted to take what might be termed a natural class of persons, split that class in two and then arbitrarily designate the dissevered fractions of the original unit as two classes, and thereupon enact different rules for the government of each. This is precisely what has been done in the case at bar, the act bestows protection on all who ply their calling and reap their financial harvests inside the precincts of a regular race course, and inflicts punishment on all who do likewise outside of those artificial boundaries."

In *State* v. *Miksicek*, 225 Mo., 561, 577, 578, a law was held discriminatory which applied to those baking biscuit, bread or cake, but not to such bakeries as made pies, pastry, crackers and confectionery. Judge Fox said:

> * * * "Where a statute, as in the case at bar, so manifestly discriminates between persons or associations belonging to the same class, we have always felt that if the organic law of the State was to be regarded as having any force or vitality, and is longer to furnish any guide to the lawmaking power in the enactment of legislation, such statute should be unhesitatingly condemned."

Tested by these decisions there can be little doubt that this law considered as the exercise of the police power is clearly discriminatory.

IV.

This particular act, however treated, is subject to the same objections as if considered merely as an exercise of the police power.

(a) It has been said, however (*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed., 679) that a law creating a tax and providing for its enforcement, is less subject to the objection of discrimination than one dealing directly with the rights of a citizen in an attempt to regulate his conduct. In other words, if this law be treated as one directly affecting the individual rights or liberty of the citizen, then it takes less of a discrimination to make it invalid, than if it were one providing for the creation and collection of a tax. In the one case, the doctrine of the Ellis, Cotting and Connolly cases is strictly applied, whereas in the other the discriminatory features must be more marked. It must then be determined whether this is really a tax law within the meaning of this point of distinction.

(b) Here no provision was made for the enforced payment of the tax. No one was made liable therefor, nor any property chargeable therewith. There was therefore no method by which it could be legally collected. This because the right to enforce its payment was solely dependent upon a specific statutory provision provided therefor (*Carondelet* v. *Picot*, 38 Mo., 125; *State ex rel.* v. *Goodnow*, 80 Mo., 271), which here was wholly wanting.

(c) The value of the entire act rests upon the ability to enforce it through the coercion of threatened criminal prosecutions. The question is, then, in its broadest sense, whether any defendant, whether keeper, buyer or seller, charged with the crime created by the act, is entitled to the protection of the fourteenth amendment, against a law denying him the right to sell upon credit or for future delivery, when the sale of the same commodity for the same price in cash, accompanied by delivery, is at the same time and place permitted. It is not really whether if this were an action to recover the tax, there is a discrimination; it is rather whether one can, by discriminatory legislation, be made a criminal, even though the purpose of making him such is to raise revenue through the form of a stamp tax. The law prohibits the keeping of a place, or the making of sales under certain conditions which create discrimination; at most it seeks to raise revenue as a method of regulation. In Gray on Limitations of Taxing Power, sec. 1404, it is said:

> "The production of revenue does not necessarily stamp the measure as an exercise of the taxing power."

This is especially true in Missouri (*Carthage* v. *Rhodes*, 101 Mo., 175, 177, 178) where:

> "Taxation may be for the purpose of raising revenue, or for the purpose of regulation; where for the purpose of regulation it is an exercise of the police power of the state."

Therefore, the case comes within the principle rather than the exception laid down by Mr. Justice Harlan (*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562, 563, 46 L. Ed., 679, 691) in this language:

> "A state may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the state by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time indirectly, to build up or protect particular interests or industries. It is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce, and discriminate against some one by declaring, that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates. We must not be understood by what has been said as conceding that the question of a denial of the equal protection of the laws can never arise

under the taxing statutes of a state. On the contrary, the power to tax is so far limited that it cannot be used to impair or destroy rights that are given or secured by the supreme law of the land."

But if considered strictly as the exercise of a taxing power, the act is discriminatory. To this phase of the case attention will be next directed.

V.

The act considered solely, even as a taxing measure, is discriminatory.

(a) The act does not require a tax to be paid upon *all* sales made at brokers' offices or market places, or even *all* sales made at exchanges, where special facilities are extended, as in *Nicol* v. *Ames,* 173 U. S., 509, 43 L. Ed., 786, nor *all* sales made of some particular article or commodity, as in *People ex rel. Hatch* v. *Reardon,* 184 N. Y., 431, 77 N. E. Rep., 970, 204 U. S., 152, 51 L. Ed., 415; nor does it deal with options in futures, as in *Booth* v. *Illinois,* 184 U. S., 425, 46 L. Ed., 623, nor with sales upon margins as in *Otis* v. *Parker,* 187 U. S., 606, 46 L. Ed. 323, where the danger to the public is such as to justify classification and regulation. This act does, however, single out certain articles, the sale of which at certain places is lawful and not harmful, but absolutely necessary, and attempts to classify those who there sell on credit or for future delivery, as distinguished from those who sell the same articles for the same prices for cash and make present delivery. No case has ever gone to the extent of sustaining such classification for any purpose whatsoever, such classification is arbitrary, artificial and fanciful, and does not rest upon a distinction differentiating the particular persons to be affected.

(b) The rule upon this subject has been thus (Gray on Limitation of Taxing Power, Sec. 1435) stated:

> "The power to impose license taxes, however, cannot be carried so far, either under the cover of the police, or the *taxing power,* as to warrant classifications which are not based on any essential differences between the classes, and have no apparent warrant in the necessities of public order, by which many seemingly arbitrary exercises of the police power are justified."

Mr. Justice Day (*Southern R. Co.* v. *Greene,* 216 U. S. 406, 417, 418, 30 Sup. Ct. Rep., 291) recently thus clearly expressed the views of this court:

> "It remains to consider the argument made on behalf of the state of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the 14th Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the state is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the state. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U. S., 150, 155, 165, 41 L. Ed., 666, 668, 671, 17 Sup. Ct. Rep, 255; *Cotting v. Kansas City Stock Yards Co.* (*Cotting* v. *Godard*), 183 U. S., 79, 46 L. Ed., 92, 22 Sup. Ct. Rep., 30; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S., 540, 559, 46 L. Ed., 679, 689, 22 Sup. Ct. Rep., 431. It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama, carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the

> burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the state, and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the state, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars."

In *People* v. *Mensching*, 187 N. Y., 8, 79 N. E. Rep., 884, it was said:

> "This is not classification, but arbitrary or accidental selection. The statute breaks into the class, and with eyes shut strikes some and lets others go. The rule governing the subject as laid down by the Supreme Court of the United States, is that there must be 'some difference which bears a reasonable and proper relation to the attempted classification.' It cannot be mere arbitrary selection."

In *Barbier* v. *Connolly*, 113 U. S., 27, 28 L. Ed., 923, 925, Mr. Justice Field said:

> "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

In *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S., 150, 41 L. Ed., 666, 668, 669, Mr. Justice Brewer said:

> "In *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S., 232 (33: 892), the question was presented as to the power of the state to classify for purposes of taxation, and while it was conceded what a large discretion in these respects was vested in the various legislatures, the fact of a limit to such discretion was recognized, the court, by Mr. Justice Bradley, saying on page 237 (895): 'All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature of the people of the state in framing their Constitution. But clear and hostile discriminations against particular

persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition.' "

The doctrine has heretofore been recognized and applied here in other tax cases (*Yick Wo* v. *Hopkins*, 118 U. S., 356, 30 L. Ed. 220; *Raymond* v. *Chicago Traction Co.*, 207 U. S., 20, 37, 52 L. Ed., 90; *Tiernan* v. *Rinker*, 102 U. S., 123, 26 L. Ed., 103; *Webber* v. *Virginia*, 103 U. S., 344, 26 L. Ed., 565; *Walling* v. *Michigan*, 116 U. S., 446, 29 L. Ed., 691), especially where there is discrimination as against residents or products of the other states (id).

In *State* v. *Gorbroski*, 111 Ia., 496, 82 N. W. Rep., 959, it was said of a license measure as to certain occupations could not be upheld by "an act intentionally and necessarily creating inequality therein, *based on no reason suggested by necessity or difference in condition or circumstances.*"

Before the decision in this case below, the Missouri courts had spoken in no uncertain terms upon this subject. There laws have been condemned as discriminatory which required a license from each line of goods sold in department stores (*State ex rel.* v. *Ashbrook*, 154 Mo., 375); exacted inspection fees and licenses for distilled spirits and beer for local, but not for foreign consumption (*State* v. *Bengsch*, 170 Mo., 81; *State ex rel.* v. *Eby*, 170 Mo., 497); required a license from a butcher in one part of a city and not in another (*St. Louis* v. *Spiegal*, 75 Mo., 145, 90 Mo., 587); or from a commission and produce man, but not from other merchants (*Kansas City* v. *Grush*, 151 Mo., 128), and required a poll tax only from those who did not vote (*Kansas City* v. *Whipple*, 136 Mo., 475). In *State* v. *Bengsch*, 170 Mo., 81, 113, Judge Sherwood said:

> "But the above is not the only instance where unjust discrimination occurs in the act under discussion, for while the manufacturer in this state of distilled and vinous liquors, manufactured for sale within our borders, pays *his* tax, the manufacturer in this state, who manufactures such articles

> for sale beyond our borders, pays *nothing*. Now suppose our Legislature should enact a law that a man who raises horses for sale in *this* state should pay for such right and privilege a tax of ten cents a head for every horse thus raised, but that the man on an adjoining farm who raises horses for sale in other states, should have that right and privilege without paying a cent of tax therefor: would any one contend that *such a tax law* could stand for a moment when brought for investigation before a court of justice?"

In *State ex rel.* v. *Ashbrook*, 154 Mo., 375, 392, 394, the department store case, the court said:

> "Thus it is seen that the uniformity clause of the constitution has been violated in this act, not only by the arbitrary and unreasonable classification of merchants of a natural class, for the particular purposes of this particular imposition * * *. If the terms life, liberty and property, as used in the constitution, are 'representative terms and cover every right to which a member of the body politic is entitled under the law,' as said by Sherwood, J., in *State* v. *Julow*, 129 Mo., l. c. 172, and that within this comprehensive scope are embraced the right to buy and sell as others may; and to pursue such honest calling, vocation or business, as the citizen may choose, subject only to such restraints or the imposition of such burdens as may be required or imposed for the general good, and if 'due process of law' is to be defined as the 'law of the land,' designated to protect and preserve the rights of the citizen against arbitrary legislation, as well as against arbitrary executive or judical action, then 'due process of law' is denied, when any particular person of a class or of the community are singled out for the imposition of restraints or burdens not imposed upon and to be borne by all of the class, or of the community at large, *unless the imposition or restraint be based upon existing distinctions that differentiate the particular individuals of the class to be affected, from the body of the community, and this question as to whether the persons thus designated constitute a natural or a reasonable class depends upon facts which the court passing upon the validity or invalidity of the legislation must determine upon.* While the Legislature under its vested authority and power may arbitrarily impose taxes, restraints and burdens of various kinds, within the constitutional limitations prescribed, that may become most onerous and oppressive to the citizen, which the courts can

> do naught but uphold, *it cannot create conditions or fiat classes, that will operate to make legislation alone applicable to those artificial conditions and classes,* as general law within the meaning of the constitution; or that will entitle it to the designation of 'the law of the land,' or that will make the act 'due process of law' by which alone the liberty of the citizens may be restrained, or their property burdened or disposed of."

In *Kansas City* v. *Grush*, 151 Mo., 128, 135, the court said:

> "The inequality of the exaction arises as readily in this case by arbitrary classification as it did in the Spiegel case by levying different amounts on the same class. No power was conferred upon the city to re-classify merchants and tax one sub-class and exempt another. Nor is there any reason why a merchant who deals altogether in produce should be required to pay $50.00 for the privilege of carrying on his business in addition to *his ad valorem* tax, while his neighbor who deals in groceries, hardware or dry goods is wholly exempt from a license tax. Both are merchants, and neither is subject to more burdens than the other. No doubt exists as to the power of the legislature or of a special charter to divide the various occupations into different classes, and that a tax upon all persons belonging to one class would not be obnoxious to the constitution merely because another class was not taxed, but when as in this case the ordinance singles out a part of a legal class, to-wit: merchants, and imposes a burden upon it, and exempts all others of the same class, then those against whom this unjust discrimination is directed may justly complain of the violation of the constitutional guarantee of equality of taxation, and equal protection of the laws."

In *Kansas City* v. *Whipple*, 136 Mo., 475, 479, involving the validity of an ordinance levying a poll tax on all voters not exercising their franchise, the court said:

> "Applying these principles to the charter provision in question it must also be conceded that, if section 39 was stripped of its proviso, it would be a legitimate expression of the taxing power of the city, whereby an equal tax is levied upon all citizens of a *certain natural and well defined class.*"

O'Keefe v. *City of Summerville*, 190 Mass., 110, 76 N. E. Rep., 457, 459, involved the validity of an excise tax on sales with trading stamps. The court there said:

> "Even if the legislature might constitutionally impose an excise tax upon the business of selling articles in the usual way, it has not attempted to do so, and this statute, if it were construed in reference to the general business of selling alone, would be unreasonable and unconstitutional, because it would impose a tax on some vendors and not upon others. We are, therefore, brought to the question whether the peculiar way of selling to which the statute relates involves a material difference in the nature of the business, such as to warrant the imposition of an excise tax on that account. The only difference referred to is the giving or delivering, as a part of the sale or in connection with it, of a stamp, or other similar device, which represents an additional right of property. Because this is entirely legitimate (see cases above cited), the attempt to tax it, as a peculiar kind of sale, is 'a discrimination founded upon an immaterial fact' which renders such a statute invalid."

People v. *Mensching*, 187 N. Y., 9, 79 N. E. Rep. 884, 886, arose after, and distinguished *People ex rel. Hatch* v. *Reardon*, 184 N. Y. 431, 77 N. E. Rep., 970, affirmed here (204 U. S. 152, 51 L. Ed., 415). There a law was passed imposing a stock transfer tax of two cents on "each hundred dollars of face value or fraction thereof" instead of upon each transfer regardless of value. It was condemned as discriminatory, the court among other things saying:

> "The act now before us does not classify by arranging according to quality, but by arranging according to accident. While it places all corporate shares in a class, still it does not treat all members of the class alike, but without method or order bears heavily upon some and lightly upon others, which in effect, is a further classification. * * * While the legislature has wide latitude in classification, its power in that regard is not without limitation, for the classification must have some basis, reasonable or unreasonable, other than mere accident, whim or caprice. There must be some support of taste, policy, difference of situation or the like; some reason for it, even if it is a poor one. While the state can

tax some occupations and omit others, can it tax only such members of a calling as have blue eyes or black hair? We have said that it could tax horses and leave sheep untaxed, but it does not follow that it could tax white horses and omit all others, or tax the sale of certificates printed on white paper, and not those on yellow or brown. While one class may be made of horses and another of sheep, or even a class made of race horses, owing to the use made of them, without a shock to common sense, a classification limited to white horses would be so arbitrary as to amount to tyranny, because there would be no semblance of reason for it. A reason might be advanced, although specious and unsound, for taxing Holstein bulls and no other, but could even a sophist argue in favor of taxing Holstein steers and no others, since they are incapable of reproduction? A classification of dealers in cigarettes into those selling at wholesale without the state and those selling at retail within the state was sustained on the ground that the two occupations are distinct (*Cook* v. *Marshall County*, 196 U. S., 261, 274, 25 Sup. Ct., 233, 49 L. Ed., 471), but could dealers in any commodity be classified according to age, size or complexion? A classification of sales into those made in an exchange and those made elsewhere was sustained in another case, but could exchanges be so classified as to tax only such sales as are made in those carried on in brick buildings? *Nicol* v. *Ames*, 173 U. S., 509, 19 Sup. Ct., 522, 43 L. Ed., 786. Perhaps an answer to these questions may be found in *Cotting* v. *Kansas City Stockyard Co.*, 183 U. S., 79, 22 Sup. Ct., 30, 46 L. Ed., 92, where a general act, the effect of which was to so classify stockyards in the state of Kansas as to discriminate against the largest stockyard in the state, but without mentioning it by name, was held to be unconstitutional because it denied to that company the equal protection of the laws. A similar fate met an act of another state, which provided that a certain tax should be imposed only upon those taxable inhabitants of a school district who had not paid a tax assessment in the year 1871. *State ex rel. Trustees* v. *Township, etc.*, 36 N. J. Law, 66. Even if a tax on farms according to acreage might be sustained, it is obvious that a tax on farms according to the number of fields into which they are divided would not be valid. Such a classification would not treat all in the same class alike, and would impose a heavier burden upon one farm than upon another of the same size, situation and value. A statute imposing such a tax would not give that 'equal protection and security' to which all, under

> like circumstances, are entitled 'in the enjoyment of their personal and civil rights.' * * * The classification was arbitrary, which 'can never be justified by calling it classification.' *Gulf, Colorado & Santa Fe Railway Co.* v. *Ellis,* 165 U. S., 150, 17 Sup. Ct., 255, 41 L. Ed., 666. There was no basis for the distinction made, no difference bearing even a colorable relation to the classification attempted. Matter of Pell, 171 N. Y., 48, 63 N. E., 789, 57 L. R. A., 540, 89 Am. St. Rep., 791; *People* v. *Orange County Road Const. Co.,* 175 N. Y., 84, 89, 67 N. E., 129, 65 L. R. A., 33; Cooley on Taxation, 596."

Laws have been on like reasoning held to be discriminatory when they impose a tax only upon foreign *unnaturalized* laborers (*Juniata Limiston Co.* v. *Fagley,* 187 Pa. St., 193, 30 Atl. Rep., 977; *Fraser* v. *Conway,* 6 Pa. Dist. R., 555), on peddlers, except those "persons who have served in the Union army or navy" (*State* v. *Garbroski,* 111 Ia., 496, 82 N. W. Rep., 959), on taxable inhabitants who had not paid a previous assessment (*State ex rel.* v. *Township,* 36 N. J. L., 66), on peddlers and transient merchants but not upon permanent merchants doing the same kind of business (*State ex rel.* v. *Parr,* 109 Minn., 147, 123 N. W. Rep., 408; *State* v. *Wagener,* 69 Minn., 206, 72 N. W. Rep., 67), upon peddlers in the state other than those of a particular county (*Com.* v. *Snyder,* 182 Pa. St., 630, 38 Atl. Rep., 356) requiring a license from each individual plumber, but providing that the license of one member of a firm or manager or a corporation should be sufficient (*State* v. *Benzenburg,* 101 Wis. 172, 76 N. W. Rep., 345; *State* v. *Gardner,* 58 Ohio St., 599, 51 N. E. Rep., 136), providing that a license fee for a place upon one street of a city shall be higher than when it is upon another (*Harrodsburg* v. *Renfro,* [Ky.] 58 S. W. Rep., 695). A license tax is discriminatory when it is on all sheep pastured in a county from which is exempted those who list their sheep and pay taxes thereon (*Lassen Co.* v. *Cone,* 72 Cal., 387, 14 Pac. Rep., 100).

VI.

The act regulates interstate commerce.

The agreed facts (Rec., 11) recite:

> "A substantial part of the sale aforesaid being of grain, provisions and other commodities which were at the time of sale in course of transportation as articles of interstate commerce."

The crime charged and proven was against the officers of the Kansas City Board of Trade for keeping the exchange where grain was sold. The character of the business there done and the methods of doing it are matters of which judicial notice will be here taken, for, as Mr. Justice Peckham (*Nicol* v. *Ames*, 173 U. S., 509, 516, 517, 43 L. Ed., 786, 792) said:

> "The Chicago Board of Trade may be taken as a type of the others in existence throughout the country, because the same features exist in all of them, while the size and importance of the Chicago institution serve only to make such features more prominent and their effect more easily discernible. We say the same features exist in all of the exchanges or boards of trade because we have the right to consider facts without particular proof of them, which are universally recognized and which relate to the common and ordinary way of doing business throughout the country, and while we could not take notice without proof as to any particular constitution or by-law of a body of this description, yet we are not thereby cut off from knowledge of the general nature of those bodies and of the manner generally in which business therein is conducted."

Grain is gathered from the fields of the west. Much of it is placed in temporary elevators near the place of production and there held until sold upon the exchanges at the great market places of the west, such as Kansas City and Chicago, for delivery to the consuming public at different places in Missouri and other places, or to purchasers in the east or south, or to shippers at the seaboard for export to foreign ports. Much of it is loaded into cars, and likewise sold while in transit for like delivery, with frequent changes of routing before actual delivery. The grain exchange does not limit the dealings thereat to the product of or in the state. If that were done the business of one state would not be sufficient to justify running an exchange. The actual movement of the grain from the fields covers but a short space of time. It must, of necessity, to a very large extent, be carried to elevators and stored to be held for a more favorable market. A requirement of actual delivery *at the time of sale* would greatly prevent this method of dealing, retard commerce and interfere with the methods of doing business necessary with grain in actual interstate transit. It would limit the elevator business to the cities where exchanges were located. To require delivery at the time and place of sale upon an exchange would place an embargo upon the interstate shipments, prevent the carrying on of the business according to practical methods now used, and be destructive of large investments in elevators throughout the country. This because the effect of the act is to compel deliveries at the place where the exchange is located. In this respect the act is in substance as objectionable as the meat inspection law condemned in *Brimmer* v. *Rebman*, 138 U. S., 78, 34 L. Ed., 862.

(b) The rule is that this court will look through forms to the substance of things and if in substance there is any interference, state legislation so interfering must fall, no matter how general its form and even though interstate transactions are not specifically mentioned.

Western Union Telegraph Co. v. *Coleman*, 216 U. S. 1, 30 Sup. Ct. Rep. 190, 197, 198 reviews all the authorities as to when state laws affect interstate, and the conclusion reached is thus stated by Mr. Justice Harlan:

> "But it is said that none of the authorities cited are pertinent to the present case, because the state *expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce*, but seeks only to prevent the telegraph company from entering the field of domestic business in Kansas without its consent, and without con-

forming to the requirements of its statute. But the disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute, as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. *This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things.* Such is an established rule of constitutional construction, as the adjudged cases abundantly show."

The learned justice then proceeded to thus review the cases:

"In *Henderson* v. *New York* (*Henderson* v. *Wickham*), 92 U. S. 259, 268, 23 L. Ed. 543, 547, which involved the question whether a statute of New York was, in any real sense, a regulation of commerce with foreign nations, the court said that, *in whatever language a statute may be framed*, its purpose must be determined by its natural and reasonable effect. In *Mugler* v. *Kansas*, 123 U. S., 623, 661, 31 L. Ed. 205, 210, 8 Sup. Ct. Rep. 273, it was said that the courts, when determining whether a statute is consistent with the fundamental law, must not deem themselves '*bound by mere forms, nor are they to be misled by mere pretenses.* They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.' In *Lyng* v. *Michigan*, 135 U. S., 161, 166, 34 L. Ed., 150, 153, 3 Inters. Com. Rep., 143, 10 Sup. Ct. Rep., 725, it was adjudged that a state could not lay a tax on interstate commerce 'in any form whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived form that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.' In *Robbins* v. *Taxing Dist.* 120 U. S. 489, 497, 30 L. Ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, it was attempted to support a local regulation about drummers upon the ground that no discrimination was made between domestic and foreign drummers,—that they were all taxed alike. But that device or form of taxation did not prevail, the court saying: 'That does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the state.' In *Minnesota* v. *Barber*, 136 U. S. 313, 319, 326, 34 L. Ed. 455, 457, 460, 3 Inters Com. Rep. 185, 10 Sup. Ct. Rep. 862, the particular statute there assailed as repugnant to the Constitution of the United States was not saved by the fact that it was applicable to citizens of all the states, including citizens of the state which enacted it. This court said: 'There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, *by its necessary operation*, be destructive of rights granted or secured by the constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void.' It was further said in that case 'that a statute may, upon its face, apply equally to the people of all the states, and yet be a regulation of interstate commerce which a state may not establish. A burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute.' In *Brimmer* v. *Rebman*, 138 U. S., 78, 81, 34 L. Ed. 862, 863, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213, the question arose as to the validity of a Virginia statute making it unlawful to offer for sale, within the limits of that state, 'any fresh meats (beef, veal, or mutton) which shall have been slaughtered 100 miles or over from the place at which it is offered for sale until and except it has been inspected and approved' as provided in the statute. The preamble of the statute recited that unwholesome meats were being offered for sale in Virginia. Such recital was held not to conclude the question as to the conformity of the statute with the constitution. Despite the avowal by the state that its object, by the statute, was to prevent the offering of unwholesome meats for sale in Virginia, this court adjudged it to be unconstitutional saying: 'Is the statute now before us liable to the objection that, by its necessary operation, it interferes with the enjoyment of rights granted or secured by the constitution? This question admits of but one answer. * * * The fees exacted under the Virginia statute for the inspection of beef, veal, and mutton, the product of animals slaughtered 100 miles or more from the

> place of sale, are, in reality, a tax;' and 'a discriminating tax, imposed by a state, operating to the disadvantage of the products of other states when introduced into the first-mentioned state, is, in effect, a regulation in restraint of commerce among the states, and as such is a usurpation of the powers conferred by the constitution upon the Congress of the United States.' *Walling* v. *Michigan,* 116 U. S., 446 455, 29 L. Ed. 691, 694, 6 Sup. Ct. Rep. 454. Nor can this statute be brought into harmony with the constitution by the circumstances that it purports to apply alike to the citizens of all the states, including Virginia; for 'a burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statutes.' *Minnesota* v. *Barber,* 136 U. S. 313, 319, 34 L. Ed. 455, 457, 3 Intrs. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Robbins* v. *Taxing Dist.,* 120 U. S. 489, 497, 30 L. Ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592. If the object of Virginia had been to obstruct the bringing into that state, for use as human food, of all beef, veal, and mutton, however wholesome, from animals slaughtered in distant states, that object will be accomplished if the statute before us be enforced."

In Galveston, *H. & T. R. Co.* v. *Texas,* 210 U. S. 217, 227, 52 L. Ed. 1031, 1037, Mr. Justice Holmes said:

> "Neither the state court nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

The Western Union case was subsequently followed and applied in *Pullman Co.* v. *Kansas,* 30 Sup. Ct. Rep., 232, 216, U. S., 56 and *International Book Co.* v. *Pigg,* 30 Sup. Ct., Rep., 481, 487, 217 U. S., 91. In the latter case Mr. Justice Harlan said:

> "It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business."

(c) Applying these principles to the act, there can be no doubt of its invalidity. It is not limited to sales of commodities in the state or not in the course of interstate shipment. It seeks to compel actual delivery *"at the time of the purchase."* If enforced, no dealer upon the exchange floor at Kansas City can, without a compliance with its terms, buy grain in interstate transit, or at the fields in Kansas and Nebraska, or in elevators in other states or at any place near the point of production, or for delivery to mills in other states, or for export. This, because, contrary to the ordinary methods of doing business, there must be delivery at the time of sale. Free and unrestricted commerce between the states is thereby necessarily restricted. It cannot exist if delivery must be made at the time of the purchase. The keeper becomes guilty of a crime upon certain conditions if he permits a sale to be made without such delivery. So to escape the requirements as to a tax, both buyer and seller must see that delivery is actually made. This necessarily impairs absolute freedom in dealing with articles of interstate commerce. So whether considered as a police regulation or tax measure, the effect upon interstate commerce is as immediate and direct as in any of the instances mentioned or cases cited by Mr. Justice Harlan in *Western Union Telegraph Co.* v. *Coleman*, 216 U. S. 1, 30 Sup. Ct. Rep. 190, 197, 198; especially as in *Brimmer* v. *Rebman*, 138 U. S. 78, 81, 34 L. Ed. 862, 863.

(d) If, however, the act be treated as an occupation or license tax, or one for facilities used for each sale, still it is in substance and effect a tribute laid upon property engaged in interstate commerce. So it has been here repeatedly decided in many occupation, license and privilege tax cases. (*Bivin* v. *Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 30 L. Ed. 694; *Lyng* v. *Michigan*, 135 U. S. 161, 34 L. Ed. 150; *Asher* v. *Texas*, 128 U. S. 129, 32 L. Ed. 168; *Brennan* v. *Titusville*, 153 U. S. 289; *Stockard* v. *Morgan*, 185 U. S. 27, 46 L. Ed. 785; *Atlantic & P. Tel. Co.* v. *Philadelphia*, 190 U. S. 160, 163, 47 L. Ed. 995, 999).

As said in *Kehrer* v. *Stewart*, 197 U. S. 60, 65, 49 L. Ed. 663, 666:

> "A tax upon the seller of goods is a tax upon the goods themselves."

(e) The act is in nowise limited in language. It is broad enough to include all commerce, state and interstate. It reaches all sales upon credit for future delivery made in the state.

The location of the property is not material; whether in interstate transit cuts no figure. The act cannot then by construction be restrained to state commerce. It must stand or fall as a whole. If it deals with or reaches interstate commerce it is void *in toto*. Such is the result of the argument already advanced (*Supra*, Div. 1) and the cases already cited. (*U. S.* v. *Reese*, 92 U. S. 214, 222, 23 L. Ed. 563, 566; Trade Mark Cases, 100 U. S. 82, 98, 99, 25 L. Ed. 550, 553; *Poindexter* v. *Greenhow*, 114 U. S. 270, 305, 29 L. Ed. 185; *Ill Cent. R. Co.* v. *McKendree*, 203 U. S. 514, 529, 51 L. Ed. 298, 304; *Howard* v. *Ill. Cent. R. Co.*, 207 U. S. 463, 500, 52 L. Ed. 297, 310.) There are other cases expressly deciding that if a state law uses general language broad enough to include interstate commerce, it cannot be sustained even as to strictly state transactions. (*Deloup* v. *Mobile*, 127 U. S. 640, 32 L. Ed. 311, 312; *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. Ed. 649; *Pickard* v. *Pullman Car Co.*, 117 U. S. 34, 29 L. Ed. 785.) *Western Union Tel. Co.* v. *Coleman*, 216 U. S. 1, 30 Sup. Ct. Rep. 190, is the latest case dealing with the subject. There, Mr. Justice Harlan reviewed the authorities and restated their effect which was in line with that which has been here said. If, therefore, this act does affect interstate commerce, it must as a whole fall. With these suggestions, we pass to a consideration of some of the reasons for sustaining the act against this objection advanced below either by court or counsel.

(f) If the act be treated as a mere police regulation, and not a measure to raise revenue, then it might possibly be upheld as one not affecting interstate commerce, provided the effect thereon was only incidental and not direct and the charge made only covered the cost of the service rendered by the state. (*Western Union Tel. Co.* v. *New Hope*, 187 U. S. 419, 47 L. Ed. 240; *Atlantic & Pacific Tel. Co.* v. *Philadelphia*, 190 U. S. 160, 47 L. Ed. 995.) Such a position was not assumed below by the court and it will not probably be here presented by counsel, because if it were sound as applied to the acts, as it is not, the discriminating features already mentioned would bring the case clearly within the Ellis, Cotting and Connolly cases, and prevent the application of the distinctions made as to state tax laws by Mr. Justice Harlan in the Connolly case. If a tax is levied to raise revenue, the act is vulnerable for the reasons already given. That its purpose was to raise revenue, was decided below.

(g) It was contended below, and the contention will probably be renewed here, that this was a tax not upon any sale or transfer, but merely upon the facilities afforded for making the sale. In answering another objection the court below so assumed. If this were true, then there is no question as to a discrimination, because the facilities for which the tax is levied are exactly the same whether the sale be for cash or upon credit, with or without delivery. Hence, any tax upon the use of those facilities for credit sales or those without delivery, would discriminate when exempting sales for cash with delivery. But a tax upon *each sale* for the facilities used is one upon property within the meaning of the rule protecting interstate commerce from state interference. A tax upon facilities, *for the purpose of raising revenue*, as decided below, necessarily interfers with such interstate commerce transactions, as are reached thereby. (*Atlantic & Pacific Tel. Co.* v. *Philadelphia*, 190 U. S., 160, 47 L. Ed., 995.)

(h) The court below in holding that there was no interference with interstate commerce rested its conclusion almost entirely upon the reasoning of the New York Court of Appeals in *State ex rel. Hatch* v. *Reardon*, 184 N. Y. 431, 77 N. E. Rep. 970, because that case was here (204 U. S. 512, 51 L. Ed. 415) affirmed. The reasoning of Mr. Justice Holmes is that which controls, especially as it was different from that of the Court of Appeals. He placed the decision upon two grounds, neither of which is here involved, first, the stock, the transfer of which was taxed, was all actually in the state; second, the plaintiff in error was not interested in any stock outside of the state or used in interstate commerce. Here the agreed facts recite that a substantial part of the sales made at the place made unlawful to keep, was at the time actually in transit as articles of interstate commerce. In other respects, the opinion of Mr. Justice Holmes supports the contentions here presented and approvingly cites many of the authorities here relied upon.

Respectfully submitted,

KIMBROUGH STONE,
FRANK HAGERMAN,
Attorneys for Plaintiff in Error.